11-344

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1043.~~ ~~[illegible]~~ 404

ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, CHARLES H. CRAWFORD, ARTHUR S. CRAWFORD, IDA E. CRAWFORD, AND ROSANNA CRAWFORD, APPELLANTS,

vs.

JOHN COCHRANE, JAMES D. WALLACE, ROBERT FORSYTHE, AND JOHN FORSYTHE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 13, 1881.

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INDEX.

	Original.	Print.
Bond for costs	2	1
Bill of complaint	2	1
Exhibits referred to in bill	13	6
Subpœna	18	9
Leave to complainants to file supplemental bill	20	9
Appearance of defendants	20	9
Order stipulating not to prejudice rights, &c	21	10
Answer of Wallace to bill	21	11
Answer of Forsythe to bill	29	15
Replication to answer of Wallace	37	19
Replication to answer of Forsythe	38	19
Order to close proofs	39	20
Order setting cause for hearing	40	20
Petition of Cochrane	40	21
Leave to Cochrane to become party defendant	43	22
Answer of Cochrane	43	22
Exhibit A, referred to in answer of Cochrane, being deed of trust (Wallace to Scoville)	52	26
Leave to Cochrane to file cross-bill	59	29
Cross-bill of Cochrane	60	30
Appearance of Wallace and R. and J. Forsythe to cross-bill	97	44
Stipulation as to testimony, &c	99	44
A. Boyer appointed special examiner	100	45
Order defaulting defendants in cross-bill	101	45
Death of W. W. Crawford suggested, and new parties added in his place	102	46
Answer of Brandies and Crawfords to cross-bill	103	46
Replication of Cochrane to answer of Brandies and Crawfords, defendants in cross-bill	117	51

	Original.	Print.
Appointment of Wright as receiver	118	51
Order as to receivership	120	52
Decree	122	53
Certificate of evidence from pages 128 to 233, inclusive, viz:		
Deposition of W. W. Crawford	129	56
G. W. McKiernan	152	65
Robert Forsythe (first)	161	68
Exhibit A to Robert Forsythe (trust deed)	184	79
Exhibit B to Robert Forsythe (deed)	186	80
Letters from Forsythe & Brown	187	80
Deposition of Robert C. Wright	197	84
Deposition of John A. Tyrrell	214	91
Tax abstracts	219	94
Deposition of R. Forsythe (second)	220	94
Abstract of title, Forsythe to Scoville	228	98
Abstract of title, Corwith to Forsythe	229	98
Opinion of Walker, Dexter, and Smith as to title	230	99
Abstract, Arthur to Corwith	231	99
Statement as to facts by the court	234	101
Opinion of the court	237	102
Appeal bond	241	103
Appeal allowed, nunc pro tunc, as of August 1st, 1881	244	104
Certificate to transcript	245	105
Citation	246	105

1 Pleas in the circuit court of the United States for the northern district of Illinois, in chancery sitting, at the United States court-rooms, in the city of Chicago, in said district, before the honorable Thomas Drummond, circuit judge of the United States for the seventh judicial circuit of the United States, on Saturday, the second day of August, in the year of our Lord one thousand eight hundred and seventy-nine and of our Independence the one hundred and fourth.

WM. H. BRADLEY, *Clerk*.

ADOLPHUS BRANDIES, WILLIAM H. CRAWFORD, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, and Rosanna Crawford
vs.
JAMES D. WALLACE, ROBERT FORSYTHE, AND John Cochrane.
} In chancery. Original bill. 10367.

and

JOHN COCHRANE
vs.
ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, James D. Wallace, Robert Forsythe, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, Rosanna Crawford, and John Forsythe.
} Cross-bill.

2 Be it remembered that on this day, to wit, the twenty-seventh day of May, A. D. 1872, came the complainants, by their solicitors, and filed in the office of the clerk of said court their bond for costs and bill of complaint in the above-entitled cause, which said bond for costs and bill of complaint are, respectively, in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, July term, A. D. 1872.

ADOLPHUS BRANDIES & WILLIAM W. CRAWFORD
vs.
JAMES D. WALLACE AND ROBERT FORSYTHE.
} In chancery.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them hereby agree and stipulate that execution may issue against my property for any costs taxed against them.

Dated this 27th day of May, A. D. 1872.

H. CRAWFORD.

(Endorsed:) Filed May 27th, A. D. 1872. Wm. H. Bradley, clerk.

Bill of complaint.

Circuit court of the United States, northern district of Illinois.

To the hon. judges of said court in chancery sitting:

3 Your orators, Adolphus Brandies and William W. Crawford, show unto your honors that they are now, and for several years have been, citizens of the State of Kentucky, and copartners doing business together under the firm name and style of Brandies & Crawford. And your orators further show unto your honors that being such copartners together in the month of September, 1865, and one Robert Forsythe and one George T. Braun who were then and there citizens of the State of Illinois, doing business together in the city of Chicago, as commission merchants in the purchase and shipment of grain and other articles upon orders from customers; that in the said month of July, 1865, the said Forsyth & Braun were directed and instructed by your orators to purchase to and for the account of your orators a large quantity of wheat to be shipped to the mill of your orators, situated at Madison, Indiana, to wit, about 6,000 bushels, and your orators were advised by the said Forsyth and Braun that they had made such purchases as directed by your orators, and thereupon, on the request and demand of the said Forsyth & Braun, your orators paid over to the said Forsyth & Brown the sum of about $9,665, which the said commission merchants then and there represented and stated to your orators was the actual market price for the wheat which had been by them purchased as factors for your orators; and thereupon your orators directed the said Forsyth & Braun to ship their said wheat to Madison, Indiana, but the said commission merchants, wholly disregarding their duty in the premises, failed, neglected and refused to ship the said wheat, as directed, but, without the knowledge of your orators, sold the said wheat and converted the proceeds to their own use, and have never
4 since hitherto paid any portion thereof to your orators.

And your orators unto your honors further show that your orator caused action to be instituted in this court for the recovery of the value of their property so as aforesaid converted by the said Forsyth & Braun, and such proceedings were afterwards had that in March, 1866, your orators did, by the consideration of this court, recover judgment for damages for the said fraudulent conversion aforesaid against the said Robert Forsyth and George T. Braun in the sum of nine thousand six hundred and sixty-five dollars and forty-nine cents and costs of suit, which said judgment remains in full force, unreversed, and unsatisfied, except by the marshall's sale, as hereinafter set forth. And your orators show that immediately after the rendition of said judgment against said Forsyth & Braun they caused a writ of fieri facias to be issued thereupon to the marshal for this district, but which writ was in the year 1866 returned by said marshal/ wholly unsatisfied and not levied as stated in said return, because there was no property of the defendants, or either of them, in said district on which to levy.

But your orators further show unto your honors that in the year 1851 the said Robert Forsyth, with his own means, purchased the following real estate in Cook County, Illinois, viz, lots four, five, and six, of E. L. Sherman's subdivision of lots four, five, and six, in block 1, in Clark's addition to Chicago, said addition being part of the southwest fractional quarter of sec. 22, township 39 north, range 14 east, and upon such purchase procured the vendor of said property, instead of executing a conveyance directly to the said Forsyth to execute and de-

5 liver to one William R. Arthur a conveyance of the said property as trustee only, and to have and hold the same in trust to permit Mary E. Forsyth, the then wife of said Robert Forsyth, to use and occupy, enjoy, and receive the rents and profits of said property for her life, and to her own use, and at any and all times, upon the order or request in writing of said Mary E. Forsyth and the said Robert Forsyth jointly, to convey said lots, or either of them, as they may designate; and in case the said Mary E. Forsyth should die without issue in the life-time of her husband, then to convey said lands to said Forsyth for life, immediately after the decease of said Mary E., to him for life and to his children, lawfully begotten, in fee simple; but if said Robert should die without issue, then to the children of his brother, Leonard E. Forsyth, and to the children of Lydia T. Warrick who may be in being at the time of said Robert's death; and in further trust that in case of the death of said Robert in the life-time of said Mary E. without lawful issue, then to convey said property to her for life and to the children of said Leonard E. Forsyth and of Lydia T. Warrick in being at the time of her decease in fee simple and remainder, which said conveyance from Horatio G. Loomis to William R. Arthur is dated March 30, 1861, and recorded on the same day in book 210, page 365; and the records of said county of Cook being destroyed your orators annex to this bill of complaint a full statement of the said trust conveyance.

And your orators further show unto your honors that after the said conveyance the said Robert Forsyth, with his own means and not otherwise, proceeded to enclose the said property and improve 6 the same; and, at the expenditure of about twenty-five thousand dollars, erected a large brick dwelling-house and out-buildings upon the said premises, and at the date of the recovery of the judgment in this court in favor of your orators and against the said Forsyth and Brown the said Robert Forsyth was in the occupation of the said dwelling-house and property, and the said Mary E. Forsyth was then in full life, and the said William R. Arthur had never conveyed the said premises or any part thereof, nor had the said Robert and Mary E. Forsyth, at any time prior to the rendition of said judgment, made any request or direction for said Arthur to convey the said property, as set forth in the said deed of trust.

And afterwards, to wit, in the year 1869, the said Horatio G. Loomis filed his bill in chancery against William R. Arthur, Leonard E. Forsyth, Robert Forsyth, Isaac Forsyth, Lydia T. Warrack, James Warrack, Phillip A. Warrack, Mary E. Warrack, and Helen M. Warrack, as defendants in the superior court of Chicago, in Cook County, Illinois, and such proceedings were afterwards had therein that, by virtue of a decree rendered therein, one Benjamin D. Magruder, as master in chancery of said court, executed a certain deed of correction of the said original conveyance to said Arthur, whereby it was provided that the said original conveyance to said Arthur should be reformed, and that the conveyance of said Arthur, on the request of said Robert and Mary E. Forsyth, should be in fee simple, absolute, and operate to cut off the several trusts thereafter specified in said original conveyance, and said master's deed, so made, executed, and delivered to said Arthur on the 6th day of November, 1869, was recorded in book 552 of 7 Cook County records, page 376, and a full, true, and complete copy of such conveyance is herewith filed and made part hereof.

And your orators further show unto your honors that on or about November 3, 1869, the said Robert Forsyth and Mary E. Forsyth directed in writing that the said Arthur should convey the said premises

to Nathan Corwith in fee simple, absolute. And thereupon the said Arthur, as such trustee, in pursuance of the trusts of such original and reformatory deeds, on the 4th day of January, 1870, did make, execute, and deliver unto the said Nathan Corwith a conveyance in fee simple, absolute, of all and singular the said property aforesaid, which was duly recorded in book 553 of Cook County records, page 274. Your orators show unto your honors that while the said trustee's conveyance recited a consideration of $1.00 that in truth and fact the said Robert Forsyth was indebted unto the said Nathan Corwith in the sum of about $5,000, and that the said conveyance was in reality only intended as a mortgage, and was made and received with the distinct understanding and agreement that when the said Corwith should receive the full payment of said indebtedness to him that he would reconvey the property in fee simple to said Robert Forsyth. And your orators further show that in pursuance of said agreement the said Corwith and wife, on the 12th day of March, 1870, signed, sealed, executed and delivered unto the said Robert Forsyth a conveyance quitclaiming to the said Forsyth all and singular the said property, for the apparent consideration of $15,000; but in reality, as your orators are advised and believe, and so charge, the only consideration was the payment by said Forsyth to said Corwith of the indebtedness due to him from the said Forsyth. The said conveyance to said Forsyth was duly recorded in book 586, of Cook County records, page 25. And your orator further shows unto your honors that on the 9th day of May, 1870, they caused an alias writ of fieri facias to be sued out upon their said judgment against said Forsyth and Brown, and the said writ was duly sealed with the seal and tested by the clerk of this court, and directed to the marshal of this district, and commanded him to levy the said writ upon the property and estate of said execution debtors. And the said marshal having, in due and strict conformity to law, levied on the said property so conveyed to said Forsyth, did proceed, on the 7th day of June, 1870, to make sale of the said property according to law, and the said real estate was purchased by your orators for the sum of eleven thousand and six hundred dollars, and neither the said Forsyth or any other person having made redemption of the same as provided by law, the said marshal, on the 9th of September, 1871, did make, execute, acknowledge, and deliver unto your orators a conveyance for the said premises, a copy of which is filed herewith and the original was duly recorded in book 648, of Cook County records, page 659, on the 12th day of September, 1871. And your orators further show unto your honors that immediately after the execution and delivery of said deed of conveyance, to wit, on or about the 10th day of September, 1871, your orators, as thereto authorized by law and their said conveyance, went into possession of the said real estate hereinbefore mentioned and each and every part thereof, and have ever since remained in full and undisturbed possession thereof. And your

8

orators further show that, on or about January 1, 1870, the said Mary E. Forsyth departed this life, leaving her husband, Robert Forsyth, her surviving and without any issue of said marriage. And your orators further show unto your honors that, on the 15th day of March, 1870, the said Forsyth signed, sealed, acknowledged, and delivered unto one George Scoville a trust deed conveying the said real estate unto him, the said Scoville, in trust to secure the payment of a certain note for $15,000, due five years after date, and also 10 other notes, each for $675, payable in 6, 12, 18, 24, 30, 36, 42, 48, 54, and 60 months at the National Bank of Commerce, in New York City, with authority

9

to make sale of said property on default in the payment of such notes or any of them, after 10 days' notice in any newspaper published in Chicago, and make conveyance therefor to the purchaser. And as your orators are advised, and so charge, the said trust deed to said Scoville was recorded in deed book 400 of Cook County records, page 417. And your orators further show unto your honors, upon information and belief, that in the month of April, 1872, the said George Scoville made sale of the said property unto James E. Wallace, who is a citizen of the State of Illinois, pretending and giving out that such sale was made in pursuance of the trusts and power contained in the said indenture unto him, the said Scoville, and as your orators are further advised the said Scoville had made, executed, delivered, and acknowledged a deed of conveyance unto the said James D. Wallace, purporting to convey to and vest in the said Wallace all and singular the real estate aforesaid, and
10 the said Wallace has caused the said conveyance to be recorded on the records of Cook County, Illinois, and does now give out and pretend that by virtue of such purchase and conveyance he hath acquired a good and complete title to the said real estate as against your orators, and a copy of the conveyance to the said Wallace is herewith filed as an exhibit, and prayed to be taken as a part of this bill of complaint by reference. And your orators show unto your honors that the said purchase was made by the said Wallace, and the said conveyance received by him with full knowledge of the judgment in favor of your orators and their purchase of the property, and the conveyance to them by the marshal as aforesaid, and the record of the same, and that your said orators were in the possession of all and singular the said property, claiming the title thereto. And your orators further show unto your honors that the said Forsyth did not execute and deliver unto the said Scoville the said deed of trust until after the lien of the judgment of your orators had become fixed upon the said real estate before described, and all the interest and estate of the said Forsyth therein, and that the sale under the judgment in favor of your orators operated to pass to and vest in your orators all the right, title, and interest of the said Forsyth in the said real estate, entirely discharged from any lien, equity, or claim of the said Scoville, or any one claiming under him by reason of anything in the said trust deed contained; and thereupon your orators charge that the sale of said property to said Wallace, in manner and form as aforesaid, and with full notice
11 of the title, claim, and equity of your orators, was contrary to equity and good conscience, and the conveyance to said Wallace, and the record thereof, as aforesaid, constitute a cloud on the title of your orators. And your orators do further show unto your honors that notwithstanding the premises and the purchase of said real estate, and the conveyance thereof to your orators, and their possession of the same as aforesaid, that the said Forsyth does now give out and pretend that he is still the owner and entitled to the possession of the said premises, and the said Forsyth harasses the tenants of your orators with notices to quit, and demands that they shall deliver up to him the immediate possession of the said premises and acknowledge him as the true and only owner thereof. All which actings and doings are contrary to equity and good conscience, and tends to the manifest wrong and injury of your orators, and forasmuch as such matters cannot be relieved at and by the strict rules of the common law, but are only relievable in a court of equity where such matters are properly cognizable, your orators, who are citizens of the State of Kentucky, pray that a writ of summons may be issued out of this court against the said James D. Wallace

and Robert Forsyth, who are citizens of the State of Illinois, commanding them to appear unto this bill of complaint, and stand to and abide by the orders of this court, and your orators further pray that the said defendants, Wallace and Forsyth, be compelled to answer the matters set forth, but without oath, an answer under oath being expressly hereby waived under the rules and practice of this court. And your
12 orators further pray that upon the hearing the title of your orators be quieted, and that the conveyance of the said Scoville to the said Wallace may be vacated, annulled, and set aside, and also the record thereof, as a cloud upon the title of your orators, and that the said Wallace and Forsyth, and each and every of their agents and attorneys, be forever enjoined and restrained from in any manner setting up title to said property as against your orators, or disturbing the possession of your orators, and your orators' title quieted, and for all further proper relief.

ADOLPHUS BRANDIES,
By W. W. CRAWFORD.
WILLIAM W. CRAWFORD.

HENRY CRAWFORD,
Solicitor.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

William W. Crawford, upon his oath, says that he is one of the complainants in the foregoing bill of complaint, and has read over the same and knows the contents thereof, and that the matters therein stated are true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes them to be true.

WILLIAM W. CRAWFORD.

E. A. DRUMMOND,
U. S. Com'r.

(Endorsed:) Filed May 27, 1872. Wm. H. Bradley, cl'k.

13 On the same day, to wit, the twenty-seventh day of May, A. D. 1872, came the complainants, and filed in said cause exhibits referred to in the bill of complaint in said cause, which said exhibits are respectively in the words and figures following, to wit:

Horatio G. Loomis to William R. Arthur, deed in trust, dated March 30, 1861, and recorded March 30, 1861, book 210, page 365; consid'n, $4,125.00; aliens, remises, releases, conveys, &c., lots 4, 5, & 6 of E. L. Sherman's subdivision of lots 4, 5, & 6, block 1, Clark's addition to Chicago, (said addition being part of SW. frl. ¼ of sec. 22, T. 39 N., R. 14 E.), upon the trust and to the uses, interests, and purposes, hereinafter expressed, limited, and declared. To have and to hold, &c., unto said party of the second part, his heirs, and assigns forever, upon trust & confidence, nevertheless, to permit Mary E. Forsythe, wife of Robert Forsythe, of Chicago, to use, and occupy, enjoy, & receive the rents and profits of said lands and premises, for her life and to her own use, and at any and all times, upon the order or request in writing of said Mary E. Forsythe and the said Robert Forsythe jointly, to convey said lots, or either or any part of them, to such person or persons as they may *they may* designate; and in case said Mary E. shall die without issue in the lifetime of her said husband, then to convey said lands to said Robert Forsythe for life, immediately after the decease of said Mary E., to hold to him and his use for life, and to his child or children, if any law-

fully begotten, in fee simple and remainder, to their use and to them equally as tenants in common. But if said Robert shall die without lawful issue, then to the children of his brother, Leonard E. For-
14 sythe, and the children of Lydia T. Warrack who may be in being at the time of said Robert's decease, in fee simple and remainder, to their use and to them equally as tenants in common. And in case said Robert shall die without lawful issue in the lifetime of said Mary E., then to convey said lands and premises to her for life immediately after the death of said Robert, to hold to her and her own use for life, and to the children of said Leonard E. Forsythe, and the children of said Lydia T. Warrack, who may be in being at the time of said Mary's decease, in fee simple and remainder as aforesaid, to their use and to them equally as tenants in common. But if hereafter said Robert shall have child or children born of his said wife or of any future wife, then instead of the conveyance aforesaid to the children of said Leonard E. Forsythe and Lydia T. Warrack, said trustee is to convey said lands to said Mary E. or to said Robert (as the one may chance to survive the other), to her or his use for life as aforesaid, and to the child or children who may be so born to them or him, in fee simple and remainder, to their use and to them equally as tenants in common. Covenants against acts of grantor. And said Arthur on his part covenants to faithfully perform and fulfill the trust aforesaid.

Signed and acknowledged by Loomis only.

80. Benjamin D. Magruder, one of the masters in chancery of superior court of Chicago, to William R. Arthur. (No. stamp.)
15 Deed dated Nov. 6, 1869, and filed for record Jan'y 6, 1870, in book 552, page 376. Consid'n, $1.00. Lots 4, 5, & 6, of E. L. Sherman's subd'n of lots 4, 5, & 6, in block 1 of Clark's addition to Chicago. (Said addition being part of SW. frac'l ¼ of sec. 22, T. 39 N., R. 14 E.) Recites decree. (No. 79 ante.*) Further recites that said Horatio G. Loomis has failed to make and execute said reformatory deed within 24 hours from the date of the entry of said decree. Therefore said master, in pursuance of said decree and in consideration of the premises & $1.00, conveys to 2d party above premises, upon the trusts and to the uses, interests, and purposes hereinafter expressed and declared. To have & to hold, &c., to 2d party upon the trust and confidence to permit Mary E. Forsythe, wife of Robert Forsythe, of Chicago, to use, occupy, & enjoy, & receive the rents and profits of said lands for her life and to her own use, and at any and at all times, upon the request in writing of said Mary E. & said Robert jointly, to convey said lots, or either or any part of them, to such person or persons as they may designate, by good and sufficient deed of conveyance in fee simple absolute, in which event the trusts hereinafter mentioned shall be cut off and forever cease, and all right, title, & interest of the several cestui que trusts hereinafter mentioned shall thereupon and thereby be revoked and forever cease. And in case said Mary E. shall die without issue in the lifetime of her said husband, then to convey said lands to said Robert Forsythe for life immediately after the decease of said Mary E., to hold to him & his use for life & to his child or children, if any lawfully begotten, in fee simple & remainder, to their use and to them equally as tenants in common. But if said Robert shall die without lawful issue, then
16 to the children of his brother, Leonard E. Forsythe, & the chil-

*No. 79, here referred to, is the case of Loomis et al. vs. Arthur et al. Case 27280, superior court.—S. & H.

dren of Lydia T. Warrack who may be in being at the time of said Robert's decease, in fee simple & remainder, to their use & to them equally as tenants in common. And in case said Robert shall die without lawful issue in the lifetime of said Mary E., then to convey said land and premises to her for life, immediately after the death of said Robert, to hold to her and her own use for life, and to the children of said Leonard E. Forsythe & the children of said Lydia T. Warrack who may be in being at the time of said Mary's decease, in fee simple and remainder as aforesaid, to their use and to them equally as tenants in common. But if hereafter said Robert shall have a child or children born of his said wife or of any future wife, then, instead of the conveyance aforesaid to the children of said Leonard E. Forsythe and Lydia T. Warrack, said trustee is to convey said lands to said Mary E. or to said Robert (as the one may chance to survive the other), to her or his use for life, as aforesaid, & to the child or children who may be so born to them or him, in fee simple & remainder, to their use and to them equally as tenants in common.

81. William R. Arthur to Nathan Corwith. (Stamp, $15.00.) Trustee's deed dated Jan'y 4, 1870, and filed for record March 15, 1870. Recorded in book 553, page 274. Consid'n, $1.00. Lots 4, 5, & 6, of E. L. Sherman's subdivision of lots 4, 5, & 6, block 1, of Clark's addition to the city of Chicago, said addition being a part of the SW. fractional ¼ of section 22, town 39, 14 east, in Cook County, Illinois. Recites that on or about March 30, 1861, by deed of that date, Horatio G. Loomis
17 conveyed to 1st party above-described premises, in trust for certain purposes in said deed mentioned, which deed is recorded in book 210 of deeds, page 365.

That it was provided in substance in said deed, among other things, that upon the order or request in writing of Robert Forsythe and Mary E. Forsythe, his wife, jointly, 1st party should convey said premises to such person or persons as they might designate. That on November 3rd, 1869, said Forsythe and wife served upon 1st party the following notice in writing. (Here follows notice, which, after making above recitals, sets forth in substance as follows.) That a mistake or omission occurred in the drawing of said deed (above mentioned), by reason of which the authority of said Forsythe and wife to compel 1st party to execute such deed and certain of said trusts is doubtful. That said Forsythe and wife, together with H. G. Loomis, at the November term of the superior court of Chicago, A. D. 1869, commenced a suit in chancery against said 1st party, and Leonard E. Forsythe, Robert Forsythe, Isaac Forsythe, Lydia T. Warrack, James Warrack, Philip A. Warrack, Mary E. Warrack, and Helen M. Warrack, for the purpose of correcting and reforming said deed, so as to accord with the intention and direction of said Forsythe and wife, as stated in said bill. Requests said 1st party, as soon as said court shall decree that said be reformed, as prayed, to make a good and sufficient conveyance of said premises in fee simple absolute to Nathan Corwith, in pursuance of the terms and provisions of such reformed deed. The deed so sought to be reformed being recorded in book 210 of deeds, page 365, dated Nov. 3, 1869.

(Signed) M. E. FORSYTH. [SEAL.]
ROBT FORSYTH. [SEAL.]

18 Further recites that the decree mentioned in said notice has been rendered and a deed executed by Benjamin L. Magruder, master in chancery of said court, in pursuance thereof and reformatory

of said 1st-mentioned deed, bearing date November 6, 1869, and not yet recorded. Therefore, said Arthur, in pursuance of the deed from said Loomis to him, dated March 30, 1861, and of the master's deed, before referred to, and of the decree of court referred to in said master's deed, and of the request in writing, above shown, from said Forsythe and wife, and in consideration of $1.00, does remise, release, sell, convey, and quit-claim to 2nd party all the right, title, and interest which he, 1st party, has in and to premises 1st-above described.

Covenants against acts of grantor.

82. Nathan Corwith and Mary E., his wife, to Robert Forsythe. ($15.00 stamp.) Deed dated March 12, 1870, filed for record March 15, 1870, and recorded in book 586, page 25. Consid'n, $15,000. Remise, release, sell, convey, and quit-claim all right, title, and interest in and to lots 4, 5, 6, of E. L. Sherman's subd'n of lots 4, 5, & 6, in block 1 of Clark's addition to the city of Chicago, said addition being a part of the SW. fr'l ¼ of sec. 22, T. 39, N., R. 14 E., in the city of Chicago, Cook Co., Ill's. Homestead waived.

(Endorsed:) Filed May 27, 1872. Wm. H. Bradley, cl'k.

On the same day, to wit, the twenty-seventh day of May, A. D. 1872, a writ of subpœna was issued out of said court in said cause, which said writ, together with the return of the marshal, is in the words and figures following, to wit:

19 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America, to James D. Wallace and Robert Forsyth, greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America, for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of July next, to answer the bill of complaint of Adolphus Brandies and William W. Crawford, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this twenty-seventh day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-sixth.

[SEAL.] WM. H. BRADLEY, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as confessed, and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

I served the within subpœna upon Robert Forsythe, therein named, by delivering to him personally a true copy thereof, on the 10th day of

June, A. D. 1872, and upon James D. Wallace, therein named,
20 by delivering a true copy thereof to him personally, on the 11th day of June, A. D. 1872.

B. H. CAMPBELL,
U. S. Marshal.
By S. H. TOURTELOTTE,
Deputy.

Marshal's fees: 2 services, 4.00; 2 copies, 1.00—5.00.

(Endorsed:) Filed June 14th, A. D. 1872. Wm. H. Bradley, clerk.

Afterwards, to wit, on the fifteenth day of June, A. D. 1872, in the record of the proceedings of said court in said cause before the honorable Thomas Drummond, United States circuit judge, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL.
vs.
JAMES D. WALLACE ET AL. } In chancery.

On motion of the complainants by their solicitors, no objection being made on the part of the defendant's counsel, leave is given them to file a supplemental bill herein.

Afterwards, to wit, on the twenty-fifth day of June, came the defendants, by their solicitors, and entered their appearance in said entitled cause in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court. In chancery.

ADOLPHUS BRANDIES & WILLIAM W. CRAWford
vs.
JAMES D. WALLACE & ROBERT FORSYTHE.

We hereby enter the appearance of the defendants in the above cause.

21 GOUDY & CHANDLER,
Sol'rs for Defendants.

(Endorsed:) Filed June 25th, 1872. Wm. H. Bradley, clerk.

Afterwards, to wit, on the twentieth day of July, A. D. 1872, in the record of the proceedings of said court in said cause, before the honorable Henry W. Blodgett, district judge of the United States for the northern district of Illinois, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL.
vs.
JAMES D. WALLACE ET AL. } In chancery.

Now come the parties by their solicitors, and the motion of the complainant for an injunction against the defendants coming on to be heard,

thereupon the defendants, by William C. Goudy, esq., their solicitor, stipulate in open court that nothing shall be done herein to prejudice the rights of the complainants until the further order of the court herein.

Afterwards, to wit, on the third day of August, A. D. 1872, came James D. Wallace, one of the defendants in said cause, by his solicitors, and filed his answer to the bill of complaint in said cause, which said answer is in the words and figures following, to wit:

Circuit court of the United States, northern district of Illinois. In chancery.

ADOLPHUS BRANDIES ET AL. }
vs.
ROBERT FORSYTHE ET AL. }

22 The answer of James D. Wallace, one of the defendants to the bill of complaint of Adolphus Brandies and William W. Crawford, complainants.

This defendant, reserving to himself all benefit and advantage of exception to the many errors and uncertainties in said bill of complaint contained, for answer thereto or to so much thereof as he is advised it is material or necessary for him to make answer unto, says that he has no knowledge or information except such as he has derived from said bill as to the transactions between the complainants and said Forsythe and Brown, recited in said bill, which constituted the cause of action upon which it is alleged in said bill the judgment therein mentioned was rendered; and therefore he neither admits nor denies the allegations of said bill in regard thereto, but he calls for proof thereof. And further answering, he says that he has no knowledge or information in regard to the judgment in favor of said Brandies and Crawford set up in said bill, or as to whether or not a writ of fieri facias issued upon such judgment, or as to whether or not an alias writ of fieri facias issued thereupon, or as to whether or not the premises in said bill mentioned were sold by virtue thereof, by the United States marshal to the said complainants as alleged in said bill, or as to whether or not the said marshal executed the deed mentioned in said bill, except as he has been informed by said bill, and except that he has been informed that some pretended sale of said premises has been made by said marshal to said complainants; and that said marshal purported to act in making the same by virtue of some writ of fieri facias issued upon some judgment in favor of said complainants; and therefore he neither admits nor denies the allegations of said bill in regard to such judgment,
23 writs, and sale, but he calls upon the complainants for proof thereof. And further answering, this defendant admits that on or about the 30th day of March, 1861, Horatio G. Loomis conveyed the premises in said bill described to William R. Arthur, upon some trust for the use of said Mary E. Forsythe, but this defendant has never seen said deed or the record thereof; and therefore, he neither admits nor denies the allegations of said bill as to the contents thereof, but calls for proof of the same. And further answering, he says that he has no knowledge as to whether or not the said Robert Forsythe purchased the said premises with his own means, or made the improvements thereon with

his own means, but that he has been informed and so believed, that said property was purchased and improved with the means and money of the said Mary E. Forsythe; and therefore he neither admits nor denies the allegations of said bill in regard thereto, but calls upon such complainants for proof thereof. And further answering, he admits the proceedings in chancery in the superior court of Chicago to reform the said deed from Loomis to Arthur, set up in said bill, and the execution of the deed of correction by said Magruder, master in chancery, a copy of which is attached to said bill. And he further admits that said Robert and Mary E. Forsythe, directed the said Arthur to convey the said premises to Nathan Corwith, and that he did, in pursuance thereof, execute and deliver to said Corwith a conveyance in fee simple thereof, as alleged in said bill; but he has no knowledge or information as to the real consideration of said deed, and therefore he neither admits nor denies the allegations of said bill in regard thereto, but calls for proof thereof. And further answering, he admits that on the 12th day of March, 1870, the said Corwith and his wife executed and delivered
24 to said Robert Forsythe a deed of conveyance of said premises upon the expressed consideration of fifteen thousand dollars; but he denies upon information and belief that said deed was made in pursuance of any such agreement as is alleged in said bill; but he alleges upon like information that said deed was made in pursuance of a purchase of said premises by said Forsythe from said Corwith for a valuable consideration paid by said Forsythe at the time of its execution out of money borrowed for that purpose by said Forsythe from one John Cochrane, as hereinafter stated. And further answering, he denies that on the 15th day of March, 1870, said Forsythe executed a deed of trust to George Scoville, as alleged in said bill; but he alleges the fact to be that for the purpose of making purchase of said premises from the said Corwith and paying the consideration therefor the said Forsythe prior thereto negotiated a loan of fifteen thousand dollars from the said John Cochrane, who agreed to make such loan upon the security of said premises, and solely upon such security, and for the purpose of effecting such loan and furnishing such security and making such purchase the said Forsythe, then a widower, on the 10th day of March, 1870, two days prior to the execution of said deed to himself by said Corwith, executed and delivered to the said George Scoville, as trustee, a deed of trust conveying said premises to him in trust to secure the payment of one note executed by him for the sum of fifteen thousand dollars, payable in five years after date, and ten interest notes for the sum of $675, each payable one every six months after date until the expiration of five years; all of said notes bearing even date with said deed of trust, and being payable to the order of said Cochrane, at the National Bank of Commerce, in New York City, which said deed of trust
25 provided, among other things, that if default should be made in the payment of any of said notes when due then the said trustee might sell the said premises for the purpose of paying and satisfying said notes upon giving ten days' notice of the time and place of sale by publication in some newspaper then published in Chicago, and might execute and deliver to the purchaser or purchasers thereof a deed or deeds in fee simple, conveying said premises, and all the interest, title, right, and equity of redemption of the said Forsythe, his heirs and assigns; and he alleges that this deed of trust was executed and delivered prior to the execution of said deed by Corwith, in order that upon the payment of the consideration money to Corwith, and the receipt of the deed from him, the legal title might enure and vest

instantly in the said Scoville, trustee, for the benefit of the said Cochrane, and as security for the repayment of said purchase money; and he alleges that the said Cochrane, in consideration of said security, did thereupon advance and loan to the said Forsythe the sum of fifteen thousand dollars, with which the consideration of the said deed from Corwith was immediately and at the same time paid to the said Corwith and the deed from him delivered, and thereupon the said deed of trust and said deed from Corwith were both recorded at the same time, to wit, on the 15th day of March, 1870; and this defendant avers that the loaning of said money, the execution and delivery of said deed of trust, and the execution and delivery of said deed from said Corwith were and should be treated in equity as one transaction, and that there was no time therein when the lien of said complainant's pretended judgment, or of any judgment against the said Forsythe, could attach to said premises; and further answering he admits that the
26 said Scoville, in the month of April, 1872, made sale of said premises, under and by virtue of the terms of said deed of trust, to this defendant, for the consideration of the sum of seventeen thousand dollars bid by him therefor, which said sum of money was by him paid to said Scoville, and said Scoville executed and delivered to him a conveyance in fee simple of said premises, as alleged in said bill, and he avers that said sale was made at public auction, after the publication of notice as required by said deed of trust, and was made strictly in accordance with the terms of said deed of trust, and that this defendant was the highest bidder at said sale, and that the same was a genuine and bona fide sale and purchase by him, and he avers that by such purchase and deed to him he became vested in fee with the title to said premises, free and clear of any claim of title by said complainants. And, further answering, he says that he has no knowledge or information as to whether the said complainants, on the 9th day of May, 1870, caused an alias writ of fieri facias to be sued out upon said pretended judgment, or not, or as to whether such writ was by said marshal levied upon said premises, or as to whether said marshal sold and conveyed said premises to said complainants as alleged in said bill, and therefore he neither admits nor denies the same, but calls for proof thereof. And, further answering, this defendant denies that on or about the 10th day of September, 1871, the said complainants went into possession of said premises lawfully, as is alleged in said bill, but on the contrary he avers the fact to be that in the month of September, 1871, the said defendant, Forsythe, was, and for a long time prior thereto had been, in the quiet and peaceable possession of said premises as
27 his homestead, and that at that time the dwelling-house upon said premises was closed and locked up by said Forsythe, and the keys thereof were in his possession, and that on or about said 10th day of September aforesaid, one D. L. Carmichael forcibly and unlawfully, without right or warrant of law, and without the consent of the said Forsythe, broke and entered said premises and house by breaking through a closed window, and thereafter for a considerable time held and retained forcible possession of said premises against the will of said Forsythe, and refused to restore the same to him, and so held and detained the possession thereof, until the 28th day of May, 1872, when he was ousted therefrom by a constable, as hereinafter stated. And he further alleges that after the purchase of said premises by himself, as above stated, the said Forsythe commenced an action of forcible entry and detainer against the said Carmichael, before Calvin De Wolf, esq., a justice of the peace, to recover possession of said premises, and in said action the

facts above alleged in regard to the possession of said Forsythe, and the unlawful and forcible entry and detainer by said Carmichael were proved, and a judgment was rendered in favor of said Forsythe, and against said Carmichael, and upon said judgment a writ of restitution issued, which was placed in the hands of a constable, who executed the same by ousting said Carmichael from such possession and delivering the same to said Forsythe on the 28th day of May, 1872, and thereupon the said Forsythe immediately delivered the possession of said premises to this defendant, who ever since then has been, and still is, in the quiet and peaceable possession thereof. And further answering he admits that the said Mary E. Forsythe departed this life without issue, as alleged in said bill; but he alleges that since her death the said Robert Forsythe has again married, and that a son has
28 been born to him, the issue of such second marriage, which child is still living. And further answering this defendant alleges that on the 26th day of March, 1868, the said Robert Forsythe was, by the district court of the United States for the northern district of Illinois, adjudicated a bankrupt upon his own petition, and that upon the 21st day of July, 1868, he was by said district court discharged from all his debts as a bankrupt, and that in such proceeding in bankruptcy the said complainants proved said pretended judgment as a claim against the estate of said bankrupt, in the usual manner, and he avers that by said discharge in bankruptcy the said pretended judgment was forever discharged and cancelled. And he further says that on the 8th day of March, 1872, the said premises were sold at public sale by Carol Gaytes, esq., the assignee in bankruptcy of the estate of the said Robert Forsythe, appointed by said district court of the United States, and purchased at such sale by this defendant, and that said assignee executed and delivered to this defendant a deed of conveyance of said premises of that date, whereby he became vested with whatever interest or title in and to said premises had been theretofore vested in said assignee. And further answering he denies that the said Forsythe pretends to be the owner of or entitled to the possession of said premises; but he avers that he himself claims to be the owner thereof, and to be entitled to such possession, and he *he* alleges that he is now in such possession. And as to all matters in said bill set forth which are not herein admitted or denied, or specifically answered, he denies them.

And now having fully answered the allegations of said bill he prays to be hence dismissed, with his reasonable costs in this behalf wrongfully sustained.

29 JAMES D. WALLACE,
By GOUDY & CHANDLER,
His Solicitors.

GOUDY & CHANDLER, *Sol'rs for Def'ts.*

(Endorsed:) Filed Aug. 3, 1872. Wm. H. Bradley, clerk.

On the same day, to wit, the third day of August, A. D. 1872, came the defendant, Robert Forsythe, by his solicitors, and filed his answer to the bill of complaint in said cause, which said answer is in the words and figures following, to wit:

Circuit court of the United States, northern district of Illinois. In chancery.

ADOLPHUS BRANDIES ET AL.
vs.
JAMES D. WALLACE ET AL.

The answer of Robert Forsythe, one of the defendants to the bill of complaint of Adolphus Brandies and William W. Crawford, complainants.

This defendant, reserving to himself all benefit and advantage of exception to the many errors and uncertainties of said bill of complaint, for answer thereto, or to so much thereof as he is advised it is material or necessary for him to make answer unto, admits that in the month of March, A. D. 1866, the said complainant recovered a judgment in this court against this defendant and the said George T. Brown for the sum of ninety-six hundred and sixty-five dollars and forty-nine cents, but he avers that he is ignorant of the cause of action upon which said judgment was so recovered, except as he is informed by said bill, and therefore he neither admits nor denies the same as alleged, but calls for proof thereof.

30 And he avers that at the time when it is alleged in said bill that the pretended business transactions occurred between the said complainant and said Brown and this defendant, out of which it is alleged grew the cause of action which resulted in said judgment, this defendant was not in partnership with said Brown, and had no business relations with him, and had nothing whatever to do with said pretended transactions, and had no knowledge about them. And he avers that if any such transactions were had by said complainant they were had exclusively with said Brown without any authority upon his part to use the name of this defendant, and he submits that he cannot be held responsible for any such transactions of said Brown even though he might have used the name of this defendant without authority. And, further answering, this defendant denies that a writ of fieri facias issued upon said judgment, which was returned in the year 1866 unsatisfied, as alleged in said bill. And further answering, this defendant admits that in the year 1861 he purchased, with his own means, the real estate and premises in said bill described, but he avers that at the time of such purchase he was not in any way indebted to the complainants, and was perfectly solvent and had an abundance of assets wherewith to pay all his debts, aside from the means with which he purchased said property, and he admits that he caused the vendor, Horatio G. Loomis, to execute and deliver a conveyance thereof to said William R. Arthur, as a trustee, instead of to himself, upon the trusts substantially as alleged in said bill, which deed was dated the 30th day of March, 1861, and recorded the same day. And he further admits that at the time of the rendition of said judgment he and the said Mary E. For-

31 sythe, his wife, were, and for some time prior thereto had been, in the possession and occupancy of said premises as a homestead, and that they had not at that time made any request or direction to the said Arthur to convey the same. And he further admits and avers that on the 5th day of October, 1869, the said Horatio G. Loomis, Mary E. Forsythe, and this defendant filed their bill in chancery in the superior court of Chicago against the defendants named in said bill, and that such proceedings were had in said cause that on the 4th day of

November, 1869, a decree was rendered therein, wherein and whereby the said court adjudged and decreed, that in March, 1861, the said Mary E. Forsythe purchased said premises of Ezra L. Sherman, who was then the equitable owner thereof, that the legal title was in said Loomis, who held the same as collateral security for a debt due him from said Sherman, and that by arrangement of parties a deed was made direct from said Loomis to said Arthur in trust. That the purchase-money for said premises was the sole and separate money of said Mary E. Forsythe who purchased said premises for a homestead and has ever since and still does occupy them as such together with her husband. That in the drafting of said deed an error had been made so that it appeared to authorize said trustee to convey simply a life estate, whereas the parties thereto had intended that it should be so drawn as to enable the said Mary E. Forsythe and this defendant at any time to compel said trustee to execute a deed in fee simple to any person whereby the trusts in said deed would be cut off and cease and by said decree the said Loomis was ordered to correct said deed so as to express said intention, and in case of his failure so to do Benjamin D. Magruder, master in chancery, was ordered to make and deliver to said Arthur a reformatory deed
32 to carry into effect said decree, and that, in accordance with said decree, the said Magruder executed and delivered to said Arthur, on the 6th day of November, 1869, such reformatory deeds, as set forth in said bill. And he further admits that on or about the 3rd day of November, 1869, the said Mary E. Forsythe and this defendant directed the said Arthur to convey the said premises to Nathan Corwith in fee simple, and that the said Arthur did, in pursuance of such direction, on the 4th day of January, 1870, execute and deliver to the said Corwith a conveyance in fee simple of said premises, as stated in said bill. And further answering, this defendant denies that such conveyance was intended as a mortgage to secure the payment of an indebtedness of about $5,000, or of any sum, from this defendant to said Corwith, with any understanding that upon the payment of such indebtedness, or any indebtedness, the said Corwith should convey such premises to this defendant, as is alleged in said bill. And further answering, he admits that on the 12th day of March, 1870, the said Corwith and his wife executed and delivered to this defendant a deed of quit-claim of said premises, upon the expressed consideration of fifteen thousand dollars, instead of $5,000 as stated in said bill, but he denies that said deed was made in pursuance of any such agreement as is alleged in said bill; but he avers that said deed was made in pursuance of a purchase of said premises by this defendant from said Corwith for a valuable consideration paid by this defendant, at the time of the execution of said deed, out of money borrowed for that purpose by this defendant from one John Cochrane, as hereinafter stated; and he alleges that said deed was filed for record in the office of the recorder of said Cook County on the 15th day of March, 1870. And further answering, he denies that on the 15th day of March, 1870, he executed a deed of trust to George Scoville, as alleged in said bill, but he avers the fact to be that for the pur-
33 pose of making purchase of said premises from the said Corwith, and paying the consideration therefor, he, prior thereto, negotiated a loan of fifteen thousand dollars from the said John Cochrane, who agreed to make such loan upon the security of said property, and solely upon such security, and for the purpose of effecting such loan and furnishing such security, this defendant, then a widower, on the 10th day of March, 1870, two days prior to the execution of said deed to himself by said Corwith, executed and delivered to said George

Scoville, as trustee, a deed of trust conveying said premises to him in trust to secure the payment of one note executed by him for the sum of fifteen thousand dollars in five years after date, and ten interest notes, for the sum of $675.00 each, payable one every six months after date until the expiration of five years, all of said notes bearing date even with said deed of trust, and being payable to the order of said Cochrane at the National Bank of Commerce in New York City, which said deed of trust provided, among other things, that if default should be made in the payment of any of said notes when due, then the said trustee might sell said premises for the purpose of paying and satisfying said notes, upon giving 10 days' notice of the time and place of sale by publication in some newspaper then published in Chicago, and might execute and deliver to the purchaser or purchasers thereof, a deed or deeds in fee simple, conveying said premises, and all the interest, title, right, and equity of redemption of this defendant, his heirs and assigns therein. And he avers that this deed of trust was executed and delivered prior to the execution of said deed by Corwith, in order that upon the payment of the consideration-money to Corwith, and the receipt of the deed from him, the legal title might enure and vest instantly in the said Scoville, trustee, for the benefit of the said Cochrane; and
34 he avers that the said Cochrane, in consideration of such security, did thereupon advance and loan to this defendant the sum of fifteen thousand dollars, with which the consideration of the deed from Corwith was immediately and at the same time paid to the said Corwith, and the deed from him delivered; and thereupon the said deed of trust and said deed from Corwith were both recorded at the same time, to wit, on the 15th day of March, 1870. And this defendant avers that the loaning of said money, the execution and delivery of said deed of trust, and the execution and delivery of said deed from said Corwith were and should be treated in equity as one transaction, and that there was no time therein when the lien of said complainants' pretended judgment or of any judgment against this defendant could attach to said premises. And further answering, this defendant admits that the said Scoville, in the month of April, 1872, made sale of said premises under and by virtue of the terms of said deed of trust to said defendant Wallace, and executed and delivered to him a deed of conveyance thereof, as stated in said bill; and he avers, upon information and belief, that the consideration of such sale and conveyance was the sum of seventeen thousand dollars, bid by said Wallace for said premises, and by him paid to said Scoville, and that the same was a genuine and bona fide sale, and vested the said Wallace with the title in fee simple to said premises. And further answering, this defendant says that he has no knowledge or information, except what he has derived from said bill, as to whether the said complainants, on the 9th day of May, 1870, caused an alias writ of fieri facias to be sued out upon said pretended judgment or not, or as to whether such suit was by said marshal levied upon said premises, or as to whether said marshal sold and conveyed said premises to said complainants, as alleged in said bill, and
35 he therefore neither admits nor denies the same, but calls for proof thereof. And further answering, this defendant denies that on or about the 10th day of September, 1871, the said complainants went into possession of said premises, "as authorized by law," as is alleged in said bill, but on the contrary, this defendant avers the fact to be that in the month of September, 1871, he was and for a long time prior thereto had been in the quiet and peaceable possession of said

premises as his homestead, and that at that time the dwelling-house upon said premises was closed and locked up by him, and the keys thereof were in his possession, and that on or about said 10th day of September aforesaid, one D. L. Carmichael, forcibly and unlawfully, without right or warrant of law, and without the consent of this defendant, broke and entered said premises and house by breaking through a closed window, and thereafter for a considerable time held and retained forcible possession of said premises against the will of this defendant, and refused to restore the same to him, and so held and detained the possession thereof until the 28th day of May, 1872, when he was ousted from such possession by a constable, as hereinafter stated. And he further alleges that after the purchase of said premises by said Wallace, as above stated, this defendant commenced an action of forcible entry and detainer against said Carmichael before Calvin De Wolf, esq., a justice of the peace, to recover possession of said premises, and in said action a judgment was rendered in favor of this defendant and against the said Carmichael, and upon said judgment a writ of restitution issued, which was placed in the hands of a constable who executed the same by ousting said Carmichael from such possession and delivering the same to this defendant on the said 28th day of May, 1872, and thereupon this defendant immediately delivered the
36 possession of said premises to said defendant Wallace, who ever since then has been and still is in the quiet and peaceable possession thereof. And, further answering, he admits that the said Mary E. Forsythe departed this life without issue, as alleged in said bill; and he further avers that since the death of said Mary E. Forsythe he has again married, and that a son has been born to him, the issue of such second marriage, which child is still living.

And, further answering, this defendant alleges that on the 26th day of March, 1868, he was by the district court of the United States for the northern district of Illinois, adjudicated a bankrupt upon his own petition, and that upon the 21st day of July, 1868, he was by said district court discharged from all his debts as a bankrupt, and that in such proceeding in bankruptcy the said complainants proved their said claims against his estate in the usual manner, and he avers that by said discharge in bankruptcy the said pretended judgment was forever discharged and cancelled. And he further says that on the 8th day of March, 1872, the said premises were sold at public sale by Carol Gaytes, esq., the assignee in bankruptcy of the estate of this defendant, appointed by said district court of the United States, and purchased at such sale by said defendant, Wallace, and that said assignee executed and delivered to said Wallace a deed of conveyance of said premises of that date as he is informed and believes. And, further answering, he denies that he pretends to be the owner of, or entitled to the possession of said premises, but on the contrary, he states his belief to be that the said Wallace is now the owner of said premises, and upon his knowledge he avers that said Wallace is in possession thereof, and this defendant has no intention of disturbing or interfering with such
37 possession. And now, having fully answered all and singular the allegations of said bill, he prays to be hence dismissed with his reasonable costs in this behalf sustained, and as to all matters and

things in said bill alleged not herein admitted or denied or specifically answered, he denies the same.

ROBERT FORSYTHE,
By GOUDY & CHANDLER,
His Solictors.

GOUDY & CHANDLER,
Sol'rs for Def't.

(Indorced:) Filed Aug 3, 1872. Wm. H. Bradley, clerk.

Afterwards, to wit, on the tenth day of March, A. D. 1873, came the complainants by their solicitors and filed their replication to the answer of James D. Wallace, one of the defendants in said cause, which said replication is in the words and figures following, to wit:

Circuit court of the United States, northern district of Illinois.

ADOLPHUS BRANDIES ET AL. }
vs.
ROBERT FORSYTHE ET AL. }

The replication of Adolphus Brandies and William W. Crawford' complainants, to the answer of James D. Wallace one of the defend ants.

The repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith, that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that
38 the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by their said bill they have already prayed.

HENRY CRAWFORD,
Solicitor.

(Endorsed:) Filed March 10th, 1873. Wm. H. Bradley, cl'k.

On the same day, to wit, the tenth day of March, A. D. 1873, came the complainants, by their solicitors, and filed their replication to the answer of Robert Forsyth in said cause, which said replication is in the words and figures following, to wit:

Circuit court of the U. S., northern district of Illinois. In chancery.

ADOLPHUS BRANDIES ET AL. }
vs.
JAMES D. WALLACE ET AL. }

The replication of Adolphus Brandies and William W. Crawford, complainants, to the answer of Robert Forsythe, one of the defendants.

These repliants, saving and reserving to themselves all and all man-

ner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of
39 the said defendant, for replication thereunto saith, that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these repliants: without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true: all which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by their said bill they have already prayed.

HENRY CRAWFORD,
Solicitor.

(Endorsed:) Filed March 10th, 1873. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the eleventh day of June, A. D. 1873, in the record of the proceedings of said court in said cause, before the Hon. Henry W. Blodgett, district judge of the United States for the northern district of Illinois, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL. / *vs.* / JAMES D. WALLACE ET AL. } In chancery.

And now comes the parties, by their solicitors, and on motion of the complainants, by their solicitors, it is ordered that the proofs herein be closed by the first day of August next.

40 Afterwards, to wit, on the thirty-first day of October, A. D. 1874, in the proceedings of said court in said cause, before the Hon. Henry W. Blodgett, United States district judge for the northern district of Illinois, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL. / *vs.* / JAMES D. WALLACE ET AL. } In chancery.

Now come the parties, by their solicitors, and on motion of complainants' solicitor, this cause is set down for hearing upon the pleadings and proofs herein.

Afterwards, to wit, on the thirteenth day of July, A. D. 1876, came John Cochrane, by his solicitor, and filed his petition in said cause; which said petition is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois. In equity.

ADOLPHUS BRANDIES & WILLIAM W. CRAWFORD
vs.
JAMES D. WALLACE & ROBERT FORSYTH.

To the honorable judges of said court:

Your petitioner, John Cochrane, who resides in the city of New York, and in the State of New York, and is a citizen of said State of New York, respectfully shows unto your honors that he is interested
41 in the result of this suit and in the ownership and possession of the premises described in the bill of complaint filed in this cause. That the right and interest of your petitioner has at all times been shown by record in the recorder's office in the county of Cook and State of Illinois, where said premises are situated since before said bill of complaint was filed, and that at the time of the filing of said bill of complaint, to wit, on the twenty-seventh day of May, A. D. 1872, said records disclosed the fact that your petitioner claimed and held a lien on said premises under and by virtue of a deed of trust made by James D. Wallace, one of the defendants, dated the seventeenth day of April, A. D. 1872, and filed for record in the recorder's office in said county of Cook on the twenty-second day of April, A. D. 1872, and recorded therein in book ninety-four of records at page fifty-five, which deed of trust was made by said defendant Wallace, to secure payment to your petitioner of the sum of seventeen thousand dollars, with interest thereon as in said deed particularly specified, a copy of which trust deed is filed with this petition and made a part hereof, and marked Exhibit A. Your petitioner further shows that default having been made in payment of a portion of said indebtedness, the trustee, under said deed of trust, advertised the sale according to its terms on the first day of May, A. D. 1876, of the premises therein described, and sold the same to your petitioner, and made conveyance thereof to him in pursuance of such sale; and that your petitioner now claims to be the owner in fee of said premises, in pursuance of such sale and conveyance to him. That as he is informed and believes the complainants in this case, and also the defendants, refuse to admit his rights in said premises; and it is necessary and proper that he should be made a party to this suit, so that the court, in determining the rights
42 of different claimants to said premises may be fully advised thereof, and may confirm and quiet the title thereto in the proper person or persons. Your petitioner further shows that it is only quite recently and within a few weeks past, and since any step has been taken in this case that he ascertained its pendency and the purposes of this litigation. That he is ready to file his answer herein, and stipulate that the proofs taken may stand the same as though he had been made a party defendant hereto originally, and that he will not in any manner delay the entire and final hearing of this case. Wherefore he prays that he may be made defendant herein, and that he have leave to an-

swer the bill of complaint and to file his cross-bill herein, which pleadings are herewith presented to the court.

And your petitioner will ever pray, &c.

JOHN COCHRANE,
By GEO. SCOVILLE,
His Solicitor.

SCOVILLE & BAYLEY,
Of Counsel.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

George Scoville, being duly sworn, saith that he is solicitor for John Cochrane, the petitioner named in the foregoing petition; that he has read the same, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated on information & belief, and them he believes to be true.

GEO. SCOVILLE.

Subscribed & sworn to before me July 12th, A. D. 1876.
E. A. DRUMMOND,
U. S. Com'r.

(Endorsed:) Filed July 13, 1876. Wm. H. Bradley, cl'k.

43 On the same day, to wit, the thirteenth day of July, A. D. 1876, in the record of the proceedings of said court in said cause, before the Hon. Henry W. Blodgett, district judge of the United States for the northern district of Illinois, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL.
vs.
JAMES D. WALLACE ET AL. } In chancery.

Upon motion and on petition filed this day herein leave is given John Cochrane to become a party defendant in this cause, and to answer herein instanter.

On the same day, to wit, the thirteenth day of July, A. D. 1876, came John Cochrane, by his solicitor, and by leave of court first had and obtained, filed his answer to the bill of complaint in said cause, which said answer is in the words and figures following, to wit:

In the circuit court of the United States for the northern district of Illinois.

ADOLPHUS BRANDIES & WILLIAM W. CRAWford
vs.
JAMES D. WALLACE & ROBERT FORSYTH, DEfendants. } In equity.

The several answer of John Cochrane, defendant in this cause, by leave of the court, to the bill of complaint of said complainants filed herein.

This defendant, reserving to himself all benefit and advantage of exception to the said bill of complaint, on account of the many

44 errors and imperfections thereof, for answer thereunto says: He denies, on information and belief, that Robert Forsyth and George T. Brown were copartners, doing business in Chicago as commission merchants in the month of July, A. D. 1865, or thereafter. And this defendant, further answering, denies, on information and belief, that said Forsyth & Brown purchased wheat for the complainants which said complainants directed them to ship to Madison, Indiana, but which wheat said Forsyth & Brown failed so to ship, and sold the same and converted the proceeds to their own use, as alleged in said bill of complaint. Further answering, this defendant admits, on information and belief, that complainants brought suit against said Forsyth & Brown in this court and recovered a judgment against them for damages in or about the month of March, A. D. 1866, for the sum of nine thousand six hundred and sixty-five dollars and forty-nine cents and costs, or thereabouts, but this defendant alleges, on information and belief, that said judgment does not remain in full force, unreversed and unsatisfied except by marshal's sale, as alleged in said bill of complaint; and says, that, as he is informed and believes, said judgment was discharged and made void in the law as against said Robert Forsyth by subsequent proceedings in bankruptcy as to him, in the district court of the United States in and for the nothern district of Illinois as hereinafter stated. And this defendant, further answering, admits, on information and belief, that execution was issued on said judgment in the year 1866, and returned no part satisfied, and no property found. This defendant further admits that said Robert Forsyth in 1861 purchased with his own means lots four, five, and six, of E. L. Sherman's subdivision, as in said bill alleged, and took a conveyance
45 thereof to William R. Arthur, as trustee, as alleged in said bill, and that said Forsyth enclosed the said lots and built a brick dwelling and out-houses thereon at large expense, and that at the time of the recovery of said judgment said Robert Forsythe, with his wife, Mary E., then living, was in occupation of said premises as a homestead, and that said trustee had not then conveyed the same, nor had any request been made to him to convey. Defendant further admits that, in 1869, Horatio G. Loomis filed a bill in chancery against said Arthur and others, as alleged in said bill, and that a decree was entered, as alleged in said bill, and that a deed of conveyance was made by the master in chancery, in pursuance of the decree entered in said suit, as alleged in said bill. And this defendant further admits that said Robert Forsyth and his wife, Mary E. Forsyth, requested said Arthur, as trustee, to make conveyance, which conveyance said Arthur made, as alleged in said bill. And this defendant further admits, on information and belief, that said conveyance was made by said Arthur to Nathan Corwith, as security to him, for indebtedness of said Robert Forsyth to said Corwith. Further answering, this defendant admits the conveyance by Corwith to said Robert Forsyth, as alleged in said bill, and he admits, on information and belief, that the only consideration therefor was the payment of said Forsyth's indebtedness to said Corwith. This defendant, further answering, says he has no knowledge, except from the allegations in said bill of complaint contained, as to whether or not an alias writ of fieri facias issued on said complainant's judgment, or whether the marshal of said district levied said alias writ on said property, or whether or not he sold the same
46 to complainants, or whether he made a deed to the complainants, as alleged, and therefore neither admits nor denies the allegations in said bill in that behalf, but leaves complainants to make

proof thereof as they may be able. Further answering, this defendant admits, on information and belief, that complainants went into possession of said premises on or about the tenth day of September, A. D. 1871, by breaking into said house and taking forcible possession thereof. This defendant further admits, on information and belief, that said Mary E. Forsyth died without issue on or about the first day of January, A. D. 1870, leaving said Robert her surviving. This defendant further admits that said Robert Forsyth executed a deed of trust to George Scoville, as trustee, conveying said real estate, but denies that the same was executed on the fifteenth day of March, 1870, but says it was executed on the tenth day of March, A. D. 1870, two days before the conveyance from said Corwith to said defendant Forsyth, and that it was filed for record in the recorder's office at the same time with said deed—that is to say, on the fifteenth day of March, A. D. 1870, which trust-deed was made to secure a promissory note of said Robert Forsyth made to this defendant for the sum of fifteen thousand dollars, with authority to make sale of property in default of payment of said note, or of any interest-notes given, as alleged in said bill. And this defendant further says that, in April, A. D. 1872, said trustee, George Scoville, was requested by this defendant to make sale, under the deed of trust to him of said premises for default made in payment of an interest note given for interest on said sum of fifteen thousand dollars, and which sale this defendant avers was made in pursuance of the trusts and powers in the indenture to said George Scoville, and at such sale said defendant
47 James D. Wallace was the purchaser, and the conveyance was made by said Scoville to him, which deed was recorded as alleged in said bill; and thereupon said Wallace thereby acquired a good and complete title to said real estate, as against complainants. And this defendant avers that, as he is informed and believes, such claim of said Wallace was just and well founded. Further answering, this defendant says that immediately upon said purchase being made by said Wallace he borrowed of this defendant, and this defendant loaned to him, the sum of seventeen thousand dollars, upon five years' time, and to secure payment thereof said Wallace made his one certain promissory note, payable to the order of this defendant, bearing date April seventeenth, A. D. 1872, for the sum of seventeen thousand dollars, payable five years after date thereof, and also made to this defendant his ten other promissory notes for interest thereon, at the rate of nine per cent. per annum, for the sum of seven hundred and sixty-five dollars each, payable respectively at intervals of six months after date thereof; and to secure payment of said notes said Wallace executed and delivered to said George Scoville, as trustee, a deed of trust conveying the south one-twenty-sixth part of lot one; also lots two, three, four, five, and six in E. L. Sherman's subdivision of lots four, five, and six of block one in Clark's addition, and lot one of block one, and the west one-half of block two of assessor's division of forty-nine and one-half acres in the southwest fractional quarter of section twenty-two, T. 39 N., R. 14 E. of 3rd P. M., which last-mentioned deed of trust contained power of sale upon default made in payment of the notes secured thereby or any part thereof, and which deed was filed for record
in the recorder's office of said Cook County April twenty-second,
48 A. D. 1872, and recorded therein in book ninety-four of records, at page fifty-five, and copy of which last-mentioned deed of trust and certificates of acknowledgment and of record thereof is filed with this answer, and made a part hereof and marked "Exhibit A." This defendant further saith, that default having been made by said Wallace

in payment of one of said last-mentioned interest notes, payable forty-two months after date thereof, and also in payment of taxes on said premises, application was therefore made by this defendant, who was the holder and owner of said principal note of seventeen thousand dollars, and of the unpaid interest notes to said George Scoville, as trustee, to advertise and sell the premises described in said last-mentioned trust deed for the purposes therein specified; and in pursuance of such application, said trustee, after giving proper notice by advertisement, offered for sale and sold the premises described in said last-mentioned trust deed on the first day of May, A. D. 1876, at auction; and this defendant was the purchaser thereof at and for the price of sixteen thousand dollars; and a deed of conveyance was thereupon given to him by said trustee of all the premises described in said last-mentioned deed of trust, and which deed of conveyance this defendant is ready to produce and prove as may be necessary, and under which last-mentioned deed of conveyance this defendant claims to be the owner in fee of all the said premises and to be entitled to the possession thereof at the present time; not only as against said Wallace, but also as against the complainants, and all other persons. Further answering, this defendant denies, on information and belief, that said Wallace purchased or received the deed of conveyance to himself at said trustee's sale, with full knowledge of
49 the alleged judgment in favor of complainants, or of any deed of conveyance to them, or of their being in possession of said premises as alleged in said bill of complaint. Further answering, this defendant denies that said Robert Forsyth did not make said trust deed until after the lien of complainants' alleged judgment had become fixed upon said real estate, and all interest of said Forsyth therein; because, this defendant says that, as he is advised by counsel and verily believes, at the time of the execution of said trust deed by said Forsyth to said Scoville, the said judgment of the complainants was no longer a lien against the right or interest of said Forsyth in said premises, the same having been satisfied and discharged by operation of the bankrupt law, and by the discharge of said Robert Forsyth in bankruptcy. And this defendant denies that the sale upon execution issued on said judgment in favor of complainants operated to pass to or vest in the complainants any right or interest of said Robert Forsyth in said premises. And this defendant further denies that the sale under said trust deed, by said Scoville, trustee, to said Wallace, was contrary to equity or good conscience; and he denies that the conveyance made to said Wallace, in pursuance of such sale or the record thereof, constitutes a cloud on complainants' title.

And the defendant further says that, as he is informed and believes, by proper proceedings in the district court of the United States for the northern district of Illinois, the said Robert Forsyth was, on or about the twenty-sixth day of March, A. D. 1868, adjudged a bankrupt under act of Congress in such cases made and provided; and afterwards, on the twenty-first day of July, A. D. 1868, he was, in due course of law, by the order and judgment of said court, discharged from all his
50 debts, including the said alleged judgment of said complainants against him. That, as this defendant is informed and believes, said complainants proved their claim in bankruptcy in the usual manner against the estate of said Robert Forsyth, and the same was allowed by the register in due form, as a claim against said bankrupt's estate; and that by virtue of his said discharge in bankruptcy, said pretended judgment of said plaintiff was forever discharged and cancelled, long before the pretended issue of the alias execution thereon, under which

it is claimed in said bill of complaint that the sale was made by the United States marshal to said complainants, of the premises described in said bill. And this defendant further saith that, as he is informed and believes, all the right, claim, and interest of said Robert Forsyth in and to said premises described in said bill of complaint, was duly conveyed according to law in said bankruptcy proceedings to Carol Gaytes, as assignee of said Forsyth in said bankruptcy proceedings, and said Gaytes, as such assignee in bankruptcy of said Robert Forsyth, sold at public auction, on or about the eighth day of March, A. D. 1872, all of said premises, according to law, to said defendant Wallace, and made a deed of conveyance thereof to him, in pursuance of such sale; so that, at the time of the making of said last-mentioned deed of trust by said J. D. Wallace to said Scoville, as trustee, whatever right or interest said Robert Forsyth may have had in said premises at any time was conveyed to and vested in said defendant Wallace, and by him conveyed to said trustee by said deed of trust, executed on the seventeenth day of April, A. D. 1872, being the deed of trust of which said Exhibit A, filed herewith, is a copy. And as to the matters and things in said bill of complaint contained, and not herein
51 specifically answered, this defendant denies the same.

JOHN COCHRANE.
By GEO. SCOVILLE, *his Sol'r.*

SCOVILLE & BAYLEY,
Sol'rs & of Counsel for Def't Cochrane.

(Endorsed:) Filed July 13, 1876. Wm. H. Bradley, clerk.

52 EXHIBIT A.—*Deed of trust.*

This indenture, made this seventeenth day of April, in the year one thousand eight hundred and seventy-two, between James D. Wallace (bachelor), of the city of Chicago, in the county of Cook and State of Illinois, party of the first part, and George Scoville, of the city of Chicago, county of Cook and State of Illinois, party of the second part, as trustee, as hereinafter specified (and in case of the death, absence, or removal from said county of Cook, refusal, or inability to act of said party of the second part, then Robert C. Wright, of the said city of Chicago, shall be, and he is hereby, appointed and made successor in trust to said party of the second part under this deed for the uses and purposes hereinafter expressed), witnesseth:

That whereas James D. Wallace has executed one certain promissory note, payable to order of John Cochrane, for the sum of seventeen thousand dollars, due five years after the date hereof; also ten other certain promissory notes given for interest, bearing even date herewith, payable to order of John Cochrane, each for the sum of seven hundred and sixty-five dollars, and due respectively in six, twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, and sixty months after the dates thereof—all of said notes, both of principal and interest, are made payable at the office of Wright and Tyrrell, in Chicago, with interest after due at nine per cent. per annum; and whereas the said party of the first part is desirous of securing the prompt and full payment of said promissory notes and interest that may accrue thereon, in whose hands soever the same may be:

Now, therefore, the said party of the first part, in consideration of the premises, and for the purposes aforesaid, and in the further

consideration of one dollar to him in hand paid by the said party
53 of the second part, the receipt whereof is hereby confessed, have and do hereby grant, bargain, sell, and convey, unto the said party of the second part, his successor in trust aforesaid, and his and their heirs and assigns, all the following-described lands and premises, situate in the city of Chicago, county of Cook and State of Illinois, to wit, the south one twenty-sixth part of lot one, lots two, three, four, five, and six, in E. L. Sherman's subdivision of lots four, five, and six of block one, in Clark's addition, and lot one of block one, and west half of block two, of assessor's division of forty-nine and one-half acres, in the southwest fractional quarter in section twenty-two, township thirty-nine north, range fourteen east of the third principal meridian; to have and to hold the same, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging, to the said party of the second part, his successor in trust aforesaid, and his and their heirs and assigns forever; in trust, nevertheless, that in case of default in payment of the said notes, or either of them, or any part thereof, according to the tenor and effect of said notes, then on application of the legal holder of said notes, or either of them, to sell and dispose of the said premises, and all the right, title, benefit, and equity of redemption of the said party of the first part, his heirs and assigns therein, at public auction, at the north door of the court-house in the city of Chicago, in the State of Illinois, or on said premises, as may be specified in the notice of such sale, for the highest and best price the same will bring in cash, at least two weeks' public notice having been previously given of the time and place of such sale by advertisement in
one of the daily or weekly newspapers at that time published in
54 said city of Chicago, and to make, execute, and deliver to the purchaser or purchasers at such sale, good and sufficient deed or deeds of conveyance for the premises sold, and out of the proceeds or avails of such sale and the purchase money paid thereon, after first paying all costs of advertising, sale, and conveyance, including the reasonable fees and commissions of said party of the second part, and all other expenses of this trust, including all moneys advanced for insurance, taxes, and other liens or assessments, with interest thereon at ten per cent. per annum, then to pay the principal of said notes, whether due and payable by the terms thereof or not, and interest due on said notes up to the time of such sale, rendering the overplus (if any) unto the said parties of the first part, their legal representatives or assigns, on reasonable request; and it shall not be obligatory upon the purchaser or purchasers at any such sale to see to the application of the purchase money, which sale or sales so made shall be a perpetual bar, both in law and equity against the said party of the first part, his heirs, and assigns, and all other persons claiming the premises aforesaid, or any part thereof, by, from, through, or under said party of the first part; and in case of the death of the grantor aforesaid, and of a foreclosure as provided in an act of the general assembly of the State of Illinois, entitled "An act to protect widows and orphans from the sacrifice of thier property by sale upon mortgages and trust deeds," approved March 30th, A. D. 1869, upon default and application made to the said party of the second part or his successor in trust as aforesaid, by any cestui que trust under this deed, it shall and may be lawful for the said
party of the second part, in his own name or otherwise, by suit
55 in any court of competent jurisdiction, to obtain a decree for the sale and conveyance of the whole or any part of said premises for the purposes herein specified by said party of the second part as

such trustee, or as special commissioner under order of court, and out of the proceeds of any such sale to first pay costs of such suit including his reasonable charges as solicitor therein, in addition to and besides the costs of advertising, sale, conveyance, and moneys advanced, with interest as above provided, then to pay the amount found by the court to be due and payable upon the indebtedness aforesaid. And in case of any suit or proceeding at law or in equity, wherein said party of the second part shall be made a party by reason of his trusteeship under this deed, he shall be allowed and paid his reasonable costs, charges, attorn*ies*' and solicitors' fees, in such suit or proceeding by said party of the first part, and the same shall be a further charge and lien upon said premises under this deed, to be paid out of the proceeds of sale thereof, if not otherwise paid by said parties of the first part. And in consideration of the money paid as aforesaid to the said party of the first part, and in order to create a first lien and incumbrance on said premises, under this deed for the purposes aforesaid, and to carry out the foregoing specific application of the proceeds of any sale that may be made by virtue hereof, the said party of the first part do hereby release and waive all right under and benefit of the exemption and homestead laws of the State of Illinois, in and to the lands and premises aforesaid, and the proceeds of sale thereof, and agree to surrender up possession thereof to the purchaser or purchasers at such sale peaceably on demand. And the said party of the second part with
or without readvertising is hereby authorized and empowered to
56 postpone or adjourn said sale from time to time at his discretion,
and also to sell said premises entire without division or in parcels as he may think best. And the said James D. Wallace for himself and his heirs, executors, and administrators, covenants and agrees to and with the said party of the second part, his successor in trust hereinafter named, and their assigns, that at the time of the ensealing and delivery of these presents he is well seized of said premises in fee simple and has good right, full power, and lawful authority to grant, bargain, and sell the same in manner and form as aforesaid; that the same are free and clear from all liens and incumbrances whatsoever; that the said party of the first part will in due season pay all taxes and assessments on said premises, and exhibit once a year, on demand, receipts of the proper persons to said party of the second part, showing payment thereof until the indebtedness aforesaid shall be fully paid, and will keep all buildings that may at any time be on said premises during the continuance of said indebtedness insured in such company or companies as the holder or holders of said notes may from time to time direct for such sum or sums as such company or companies will insure for, not to exceed the amount of said indebtedness except at the option of said party of the first part, and will assign with proper consent of the insurers the policy or policies of insurance to said party of the second part, as further security for the indebtedness aforesaid. And in case of the refusal or neglect of said party of the first part thus to insure or assign the policies of insurance, or to pay taxes, said party of the second part, or his successor in trust, or the holder of said notes
or either of them, may procure such insurance, or pay such taxes,
57 and all monies thus paid, with interest thereon at ten per cent.
per annum, shall become so much additional indebtedness secured by this deed of trust, and to be paid out of the proceeds of sale of the lands and premises aforesaid, if not otherwise paid by said party of the first part. A reconveyance of said premises to be made to said party of the first part, his heirs, or assigns, at their expense, on full pay-

ment of all the indebtedness aforesaid, and performance of the covenants and agreements made herein by the party of the first part. But in case of a breach of any of the covenants or agreements herein, by the party of the first part, his executors, administrators, or assigns, the said premises shall be subject to sale and conveyance on request of the legal holder of said notes or either of them, in like manner, and with the same effect, as if the said indebtedness had matured. And said party of the first part for himself, and his heirs and assigns, do further covenant and agree to and with said party of the second part, his successor in trust aforesaid, and his and their assigns, that in case of a sale and conveyance as aforesaid of said premises, the deed and deeds of conveyance made in pursuance of such sale shall be prima facie evidence of the due compliance with and performance of the terms, conditions, and requirements of this deed of trust, by the party of the second part, or his successor in trust aforesaid, in advertising and making such sale and conveyance to the extent of the recitals contained in such deed or deeds. In witness whereof the said party of the first part *have* hereunto set his hand and seal the day and year first above written.

JAMES WALLACE. [SEAL.]

58 STATE OF ILLINOIS,
City of Chicago, Cook County, ss:

I, Robert C. Wright, jr., notary public in and for the said city of Chicago, in said county, in the State aforesaid, do hereby certify that James D. Wallace (bachelor), who is personally known to me as the same person described in and who executed the within trust deed, appeared before me this day in person, and acknowledged that he signed, sealed, and delivered the same as his free and voluntary act for the uses and purposes therein set forth, including the release and waiver of all right under and benefit of the exemption and homestead laws of the State of Illinois, in and to the premises therein described, with the appurtenances and the proceeds of sale thereof.

Given under my hand and notarial seal this 19th day of April, in the year of our Lord one thousand eight hundred and seventy two, at said city of Chicago.

[NOTARIAL SEAL.] ROBERT C. WRIGHT, JR.,
Notary Public.

STATE OF ILLINOIS,
Cook County, ss:

No. 26044.

This instrument was filed for record in the recorder's office of Cook County aforesaid, April 22nd, A. D. 1872, at o'clock m., and recorded in book 94 of records, page 55.

NORMAN T. GASSETTE,
Clerk of the Circuit Court of said County and ex-officio Recorder.

(Endorsed:) Filed July 13, 1876. Wm. H. Bradley, clerk.

59 Afterwards, to wit, on the second day of October, A. D. 1876, in the record of the proceedings of said court in said cause before the Hon. Henry W. Blodgett, United States district judge for the northern district of Illinois, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL.
vs.
JAMES WALLACE ET AL. } In chancery.

On motion leave is given the defendant John Cochrane to file a cross-bill herein.

60 And afterward, to wit, on the fourteenth day of October, A. D. 1876, came John Cochrane, by his solicitor, and by leave of court first had and obtained, filed his cross-bill in said cause; which said cross-bill is in the words and figures following, to wit:

Cross-bill.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

To the honorable the judges of said court:

John Cochrane, who is a citizen of the State of New York, residing in the city of New York in said State, brings this his cross-bill of complaint against Adolphus Brandies & William W. Crawford, who are citizens of the State of Kentucky, residing at in said State, and Robert Forsythe, James D. Wallace, & John Forsythe, who are citizens of the State of Illinois, residing in Cook County, in said northern district of Illinois.

And thereupon said Cochrane complains, and says that, on or about the twenty-seventh day of May, A. D. 1872, said Adolphus Brandies and William W. Crawford, as complainants, filed their bill of complaint in this court, on the chancery side thereof, against said James D. Wallace and Robert Forsythe, alleging, amongst
61 other things, that said Brandies & Crawford had recovered a judgment at law in this court some years before that date against said Robert Forsythe and one Brown, and claiming that by virtue of a sale and conveyance made by the marshal of said district, upon execution issued on said judgment, the said Brandies & Crawford acquired title to lots four, five, & six of E. L. Sherman's subdivision of lots four, five, & six, in block one in Clark's addition to Chicago, and that they, the said Brandies & Crawford, were entitled to the ownership and possession of said premises by virtue of said sale and conveyance to them, and alleging, amongst other things, that said James D. Wallace and Robert Forsythe were conspiring together to annoy and harass said complainants in the ownership and possession of said premises by claiming title thereto, and otherwise, and praying that the title of said complainants in and to said premises might be quieted, and that the claims of said Wallace and Robert Forsythe against the same premises might be made null and be set aside, and they be forever enjoined from setting up title thereto as against said complainants, all which with other things will more full appear by reference to said bill of complaint now on file in said cause in this court.

Your orator further shows unto your honors that said James D. Wallace and said Robert Forsythe, within a few months after
62 the filing of said bill of complaint, and in the said year, A. D. 1872, filed their several answers thereto, denying the title of

complainants in and to said premises, and claiming the right of ownership and possession of said premises for said James D. Wallace under and by virtue of a sale and conveyance made to him by George Scoville, trustee in a certain deed of trust of the same premises executed by said Robert Forsythe to said Scoville as trustee, to secure a loan of money, amounting to fifteen thousand dollars, made by your orator to said Robert Forsythe, when he was apparently the owner in fee of said premises; all which, with other things, will more fully and at large appear by reference to said answers now on file in said cause.

Your orator further shows unto your honors that he was permitted by this honorable court to become a party defendant to said original bill of complaint, and filed his answer thereto on or about the thirteenth day of July, A. D. 1876, wherein, amongst other things, he denies the alleged right and interest of said complainants in said original bill in and to the said premises, and claims under the state of facts in his said answer disclosed that he, your orator, is the true and rightful owner in fee of said premises and is entitled to have the adjudication of this honorable court, quieting his title therein and thereto, as against all other persons, to which answer of your orator he prays leave
63 to refer for greater certainty and particularity.

Your orator further shows unto your honors that his right and interest in said premises was acquired as follows, to wit:

That in or about the month of March, A. D. 1870, your orator was applied to by said Robert Forsythe for a loan of money to the amount of fifteen thousand dollars, to be secured by deed of trust upon said premises, and your orator gave said Robert Forsythe to understand that he would make such loan provided the title to said premises should be shown by proper abstracts of title to be good in him, said Robert Forsythe, and a written opinion from competent attorneys in the city of Chicago, where said premises were situated, should also be obtained, showing said title to be good in said Robert Forsythe. That in pursuance of such negotiations an abstract of title of said premises was procured and produced by said Robert Forsythe, made by Jones and Sellers, a reputable firm then engaged in making abstracts of title to real estate in said city of Chicago, and whose abstracts were commonly considered, and were received and referred to in business of that character in said city of Chicago, as being good and sufficient for the purposes intended; that is to say, as showing the record title of premises which they purported to show, in the county of Cook, where said city
64 of Chicago is located, which abstract of title so made by Jones & Sellers bore date the fifteenth day of February, A. D. 1870.

Your orator further shows unto your honors that at the suggestion of said Robert Forsythe said abstract of title was submitted for examination to the law firm of Walker, Dexter & Smith, composed of J. M. Walker, Wirt Dexter, and W. P. Smith, esq'rs, highly respectable and competent attorneys of said city of Chicago, and whose opinion in such matters would be readily taken without hesitation by persons loaning money on real estate security or purchasing real estate in said city of Chicago, said legal firm having character and reputation among the first lawyers in said city of Chicago in their profession.

Your orator further shows unto your honors that on or about the fourteenth day of March, A. D. 1870, said firm of Walker, Dexter and Smith furnished to your orator their written opinion of title to said premises, in pursuance of the submission to them of the abstract of title for that purpose, which was as follows, to wit:

"We have examined the abstract of title made by Jones & Sellers, and

bearing date February 15th, 1870, of lots four, five, and six of E. L. Sherman's subdivision of lots four, five, and six in block (1) one of Clark's addition to Chicago, said addition being a part of the south-west fractional quarter of section twenty-two (22), town thirty-nine (39) north of range fourteen (14) east of the 3d P. M., in the
65 county of Cook and State of Illinois, together with a deed from William R. Arthur to Nathan Corwith, not yet recorded, but which bears date January 4th, 1870, and a deed from Nathan Corwith & wife to Robert Forsythe, bearing date the 12th day of March, 1870, and not yet recorded, both of which deeds convey the property above described; and we are of opinion that the title to said premises, as shown by said abstract and the two deeds above mentioned, is good at the date hereof in Robert Forsythe.

"Chicago, 14th March, 1870.

"WALKER, DEXTER & SMITH."

The original thereof being in your orator's possession and ready to be produced and proved as may be necessary; that, as stated in said opinion, there was also submitted to said legal firm at the same time, and together with said abstract of title, the deed of conveyance from William R. Arthur, trustee, to Nathan Corwith, bearing date January 4th, A. D. 1870, and also a deed of conveyance from said Corwith and wife to said Robert Forsythe, bearing date March 12th, A. D. 1870, also referred to in said opinion, and which two last-mentioned deeds of conveyance were thereafter, to wit, on the fifteenth day of March, A. D. 1870, filed for record in the recorder's office in said county of Cook, at the same time with the filing for record of the deed of trust exe-
66 cuted by said Robert Forsythe (then a widower) to George Scoville, as trustee, to secure said loan of fifteen thousand dollars, made by your orator to said Robert Forsythe.

That your orator required a further and additional abstract of title to be made, showing the filing for record of said deeds of conveyance, Arthur to Corwith, Corwith & wife to Robert Forsythe, and Robert Forsythe to George Scoville, which, according to the written opinion of said legal firm of Walker, Dexter & Smith, would make the title to said premises good of record in said Robert Forsythe, and the security of said trust deed, for the use and benefit of your orator, good and sufficient security on said premises to the extent of the value thereof, which additional abstract, made by Chase Bros. & Co., competent and reliable persons in that business, is in your orator's possession, ready to be produced and proved, as may be necessary, and a copy of which is annexed to this your orator's cross-bill of complaint, and made a part hereof, marked Exhibit A.

And thereupon your orator, having full confidence in the title to said premises, as shown of record, in said Robert Forsythe, and in the legal opinion of the sufficiency of said title, so furnished to him by said firm of Walker, Dexter & Smith, loaned to said Robert Forsythe the said sum of fifteen thousand dollars, & took his promissory note, secured by said trust deed to Scoville, for the principal sum of fifteen
67 thousand dollars at five years after date, and also notes for semi-annual interest thereon, six hundred and seventy-five dollars each, payable at regular intervals of six months after the date thereof during said term of five years, and said notes and deed of trust being executed by said Robert Forsythe March the tenth, A. D. 1870, and bearing date on that day, being contemporaneous with the execution of said trust deed.

And your orator further shows unto your honors that said transaction on his part was solely and only a loan of money, made in good faith, without any knowledge on his part, or notice to him of any claim, lien, right, or interest of said complainants in said original bill of complaint, in or to said premises, or any part thereof; and your orator further makes, as an exhibit to this his cross-bill of complaint, marked Exhibit B, a substantial copy of said deed of trust, executed by said Robert Forsythe to said Scoville as trustee, & prays that the same may be considered as a part of this cross-bill.

You orator further shows unto your honors that said Robert Forsythe having made default in payment of certain of the interest notes secured by said deed of trust, your orator, being the legal holder thereof, applied to said Scoville as such trustee to advertise and sell said premises according to the terms of said deed of trust; and
68 in pursuance of such application said trustee advertised the sale of said premises according to the terms and conditions of said deed of trust, to be made on the seventeenth day of April, A. D. 1872. That sale was made at that time by said Scoville, as such trustee, in pursuance of such advertisement, and according to the terms of said deed of trust; and the said premises were struck off and sold to said James D. Wallace, by said trustee, for the bid and price of sixteen thousand seven hundred dollars, which was the amount, or very nearly the amount, that was then due and unpaid of said Forsythe's indebtedness to your orator on said fifteen-thousand dollar loan, and the costs and expenses of such sale.

Your orator further shows unto your honors that, a short time before such advertisement was made by said trustee, it had come to the knowledge of your orator's agents in Chicago, who made said loan for him, and had attended to collection of interest thereon, that the complainants, in the original bill of complaint filed in this case, had, or claimed, some right or interest in the premises conveyed by said deed of trust, under or by virtue of a judgment against said Robert Forsythe; but neither your orator nor his said agents had any definite notice or knowledge of said claim, the record of said judgment, if any ever existed, having been destroyed in the great fire of October 9, 1871, and the rec-
69 ord of proceeding in bankruptcy as to said Robert Forsythe, who had been adjudicated a bankrupt by the district court of the United States for the northern district of Illinois, prior to said fire, being also destroyed therein.

Your orator further shows that the necessity having arisen of foreclosure of said trust deed by advertisement & sale of the premises, on account of default in payment of interest by said Robert Forsythe, as hereinbefore stated, said John Forsythe, who is made a party defendant to this cross-bill, came to your orator's agents in Chicago, Messrs. Wright & Tyrrell, and proposed that he would, through his step-son, said defendant Wallace, be a bidder at such proposed sale, and if the property should be purchased by him or said Wallace as the highest and best bidder at such sale he would borrow the money of your orator again and give security therefor by deed of trust on the same premises, and would also include therein two lots and a fraction of a third lot adjoining said premises on the north, known & described as lots 2 & 3 and the south $1\frac{4}{12}$ feet of lot one in the same subdivision with said lots 4, 5, & 6 in said first trust deed described, and of which he claimed to be the owner; and the title to which other or additional premises said John Forsythe represented to your ora-

70 tor's said agents he would procure to be conveyed to said Wallace, so that the deed of trust which he might give to secure the new loan it was proposed your orator should make to said Wallace, in case he became purchaser at such trustee's sale, would be a valid and first lien on said lots 2 & 3 & the south $1\frac{4}{12}$ feet of lot one aforesaid. And said John Forsythe further proposed to your orator's said agents that if your orator would make such loan to said Wallace, and would increase the amount to seventeen thousand dollars, he would not only put in the additional lots as security therefor in the new trust deed, but would also himself guarantee payment of the notes said Wallace would make to your orator, and would employ counsel and take the necessary steps in law or equity to set aside and dispose of the claims of the complainants in the original bill of complaint filed in this case to the premises therein described, being the same premises described in said first deed of trust.

Your orator further shows unto your honors that said John Forsythe being reputed to be a man of abundant pecuniary responsibility, and being a lawyer himself, and well versed in matters relating to real estate titles in Cook County, and having retained in said business W. C. Goudy, esq., a lawyer eminently qualified to carry on an aggres-
71 sive or defensive contest in relation to said premises on behalf of said John Forsythe & of said Wallace, your orator relying on said John Forsythe and his said legal adviser to do what had been been proposed to him as aforesaid to be done, agreed to and with said John Forsythe that he would make a loan to $17,000 to said Wallace in case he became purchaser at such proposed trustee's sale, on five years' time, at nine per cent. interest, to be secured by trust deed, the notes to be executed by said Wallace for principal and semi-annual interest, and to be guaranteed said John Forsythe, and such trust deed to cover said south one & $\frac{4}{12}$ feet (being equivalent to the south $\frac{1}{26}$ part) of lot one, lots 2, 3, 4, 5, & 6 in said Sherman's subdivision: the title to the part of lot one & lots 2 & 3 aforesaid to be good and perfect in said Wallace at time of execution of such trust deed: and said John Forsythe to take such steps as might be necessary, with the aid & counsel his said attorney, W. C. Goudy, to perfect the title to said lots 4, 5, & 6 in said Wallace, and especially to have set aside, or effectually disposed of in the law, the claims of said complainants in said original bill therein and thereto, without expense to your orator.

Your orator further shows unto your honors that said sale was
72 duly made under said first deed of trust, by the trustee therein named, George Scoville; according to its terms, on or about the 17th day of April, 1872, and said Wallace was the highest and best bidder thereat, and became purchaser of all the premises described in said deed, at the bid and price of $16,700, being the amount then due to your orator on said loan to Robert Forsythe, and the costs and expenses of such sale, and a trustee's deed of conveyance was made to him by said trustee; that a new loan was immediately thereupon negotiated and effected by said Wallace, through said John Forsythe, by your orator, upon the terms and conditions and in pursuance of the propositions that had been before that time submitted to your orator by said John Forsythe, as hereinbefore stated and set forth and agreed to by your orator; and said Wallace thereupon made his promissory notes to your orator, dated April 17th, 1872, the principal note for $17,000 payable five years after date, and ten interest notes for $765, each payable at intervals of six months after date, and all were guaranteed in writing on the back by said John Forsythe, and were secured by a

deed of trust executed at the same time by said James D. Wallace to said George Scoville, as trustee, on said five lots and a fraction, as proposed and agreed; and your orator's said agents in Chicago
73 turned over the abstracts of title to said premises to said John Forsythe, so that he might go on and perfect the title of said Wallace to said first-named three lots, as agreed to be done by him.

And your orator further shows that he & his said agents relied entirely upon the assurance, promise, & agreement of said John Forsythe as to the title of said lots two & three & a part of one being good, perfect, and unencumbered in said Wallace at the time of his making said deed of trust, and also upon his, John Forsythe's, assurance, promise, and agreement that he would, in a short time, a very few weeks at farthest, perfect title in said Wallace as to the said lots 4, 5, & 6, by obtaining a complete and sufficient extinguishment of the claims thereto of said complainants, which assurances, promises, and agreements were freely and fully made, given, and entered into by said John Forsythe to and with your orator, and were the inducement, in a large measure, for his making said loan of $17,000 to said Wallace; that it was understood by and between the said John Forsythe and your orator's said agents that said John Forsythe was the real party in interest, though the name of said Wallace, his step-son, was used, and your orators relied largely upon that fact, from the known ability, financial and otherwise, of said John Forsythe to fulfill his undertakings and to keep his promises.

74 Your orator further shows that at the same time of the making of said assurances of title to portions of said premises by said John Forsythe to your orator, & of his agreement to perfect the title to other portions thereof, as hereinbefore stated and set forth, said John Forsythe was the holder of a tax certificate or certificates of sale of all of said premises, obtained by him as purchaser, at a tax sale, November 14th, 1870, for the State and county taxes thereon of 1869, which fact was unknown to your orator and to his said agents in Chicago, and which was concealed from them purposely by said John Forsythe, as your orator now believes from subsequent developments, in order that he might acquire a tax title to said premises, to the prejudice of your orator's security thereon.

Your orator further shows that said John Forsythe did obtain a tax deed from the county clerk of Cook County, State of Illinois, purporting to convey to him all of said premises, in his own name, upon the certificate of sale so held by him as aforesaid, on or about the second day of April, A. D. 1873, which was recorded in the recorder's office of said county, April 29th, 1873, in book 232 of records, at page 119, and under which tax deed he is claiming to be the owner in fee, and to be entitled to possession of said premises; that the amount of said
75 sale was one hundred & eighty-seven dollars and seventy-one cents, or thereabouts, and which was the amount of money invested by said John Forsythe therein, if any money was so invested by him; but which your orator does not admit to have been done. Your orator believes, and so charges the facts to be, that said Robert Forsythe furnished the money to purchase said premises at said tax-sale, or refunded the same afterwards to said John Forsythe, and therefore he charges that, it being the duty of said Robert Forsythe to pay said taxes to protect your orator's security, given by him on said premises, he could not, and would not be permitted at law or in equity, to acquire or hold, in his own name, or in that of said John Forsythe, any right or interest in or to any portion of said premises antagonistic to that of

your orator under his said trust deed, made by said Robert Forsythe. And your orator claims and insists that if it shall prove true that said Robert Forsythe, in the first instance, or subsequently, paid or furnished the money to acquire said tax certificate or tax deed, the same cannot and should not be held against your orator's rights in said premises; and if it shall appear, upon proof made, that said John Forsythe furnished the money for that purpose, then & in that case your orator claims and insits that he ought not to
76 be permitted to hold or claim any right or interest in or to said premises or any part thereof, under said tax sale or tax deed by reason of or against the rights of your orator, by reason of the relation of trust and confidence between him & your orator, at the time of and before and after the making of said loan of $17,000, by your orator to said John Forsythe in fact, though in the name of said Wallace, as hereinbefore particularly stated and set forth, and by reason also of your orators being lulled into repose; and making no investigation or inquiry into tax sales of said property, and therefore being ignorant of said tax sale, through the assurance of said John Forsythe repeatedly made by him to your orator to obtain said loan of $17,000; that the title of said fraction of lot one, & all of said lots 2 & 3 was perfect and free of all incumbrance in said Wallace; and that there was no other or further charge or claim against said lots 4, 5, & 6, than the claim of said complainants in this suit, and which he would soon remove or cause to be removed. And your orator relied implicitly upon such assurance of said John Forsythe, and made said loan of $17,000. Upon faith in his promises to protect and make good the title of said Wallace to every part of the premises included in his trust deed, a copy of which trust deed is herewith filed and made a part of this
77 cross bill, marked "Exhibit B." And if it shall appear upon proof made that said John Forsythe has paid out any money on his own account at said tax sale, which has not been refunded to him, or has paid any money for other taxes on said premises, your orator offers to allow him in an account to be taken thereof in this suit, the whole amount so paid by him, with legal interest thereon, he being charged with a reasonable sum for rents, and for the use & occupation of said premises, while he has had possession thereof as hereinafter stated.

Your orator further shows unto your honors that said Wallace entirely failed to pay anything on his said notes, principal or interest; that the interest notes which became due and payable in October, 1872, in April, 1873, in October, 1873, in April, 1874, in October, 1874, and in April, 1875, were severally paid by said John Forsythe to your orator, and when the interest note due in Oct., 1875, became due and payable, said John Forsythe was unable, or at least unwilling, and refused to pay the same, and has paid nothing since April, 1875, on said indebtedness. That by reason of the non-payment of said interest note due in October, 1875, and the declaration of said John Forsythe, that he would not pay the same, your orator, in the fore part of April, 1876, applied to said trustee, George Scoville, to advertise and sell under said
78 trust deed, made by said Wallace, according to its terms, and after duly advertising the sale, said trustee sold said premises on the first day of May, 1876, in pursuance of such application made to him, & according to the terms and conditions of said trust deed; and at such sale your orator became the purchaser of all of said premises, described in said deed of trust made by said Wallace, he being the highest bidder, for the sum of sixteen thousand dollars; and after pay-

ing the costs of such sale, the interest notes that matured in October, 1875, and in April, 1876, with interest according to their terms, there was remaining the sum of fourteen thousand one hundred and eighty-two dollars & ninety-six cents, which was applied and endorsed by said trustee on said principal note for $17,000, leaving a balance due thereon to your orator froms aid Wallace, as maker, and said John Forsythe, as guarantor, and which will be payable on the 17th day of April, 1877, of $2,817.04, with interest thereon at nine per cent. per annum, from and after the first day of May, 1876.

Your orator further shows unto your honors that, at the time of making said original loan to Robert Forsythe, and also at the time of making said second loan to said John Forsythe, the premises given as security were considered to be very valuable, and were worth
79 nearly or quite twice the amount of the loan in each case; but by reason of the great depreciation in real estate subsequent thereto, and through neglect of the improvements on said lots, and consequent losses in value, the whole of said premises had declined in value so that at the time of said last trustee's sale your orator bid and paid the full cash value thereof, with good title, to wit, said sum of $16,000, relying on the liability of said John Forsythe to make good said title by release of his tax claim thereon, and upon the invalidity of the claims of said Brandies and Crawford to the three lots claimed by them, upon the grounds and for the reasons hereinafter particularly stated and set forth.

Your orator further shows unto your honors that, in pursuance of his said purchase at said sale on the first of May, 1876, said trustee, George Scoville, executed and delivered to him a deed of conveyance of all of said premises on said first day of May, 1876, and which was duly acknowledged and was recorded immediately thereafter in said recorder's office, whereby your orator became and still is the owner in fee of all of said premises; and became and is now entitled to possession thereof. That at the time last aforesaid, said premises were unoccupied and soon thereafter your orator sent a person to take possession thereof
80 and found that said John Forsythe had gone into possession, claiming ownership under his said tax title; and he is still, by himself, or some agent of his, holding such possession, to the great wrong and injury of your orator.

And your orator further charges and insists that said John Forsythe, being the debtor of your orator on said loan of $17,000, which was secured by trust deed on said premises, as aforesaid, was equitably bound to protect and make good and effectual to your orator his said security; and should not be permitted to acquire, hold, or assert any right or interest therein adverse to your orator's rights; and that his holding and asserting a claim, by tax title, adverse to your orator as above set forth, is contrary to right and equity, and he ought not to be permitted so to do.

Your orator further shows unto your honors that, as he is informed and believes, said complainants, in said original bill of complainant, Adolphus Brandies and William W. Crawford, recovered a judgment at law in this court, in or about the month of March, 1866, against said Robert Forsythe, and one George T. Brown, for the sum of $9,665.49, and costs of suit, or thereabouts, and that the claim of said complainants in & to said lots 4, 5, & 6 arises from sale by the marshal to them upon execution issued on said judgment, after said judgment was
81 satisfied and discharged in the law, as to said Robert Forsythe,

by his discharge as a bankrupt from all his debts, by the district court of the United States for the nothern district of Illinois.

Your orator further shows unto your honors that at the time of the execution and delivery of said first-mentioned deed of trust, made by said Robert Forsythe to said George Scoville, to secure payment of the first loan of $15,000, made by your orator to said Robert Forsythe, he was owner in fee of said lots 4, 5, & 6, as your orator is informed and believes, and as he was at the time advised by the legal opinion of said Walker, Dexter & Smith, as hereinbefore stated; and the said deed of trust, then made and recorded, became a valid and first lien on said three lots, to wit, at the date of record thereof, on the 15th day of March, A. D. 1870.

Your orator further shows that soon thereafter, to wit, on or about the ninth day of May, A. D. 1870, said Brandies & Crawford, disregarding your orator's rights under his said security of trust deed, and intending to create a cloud on the title of said lots 4, 5, & 6, so as to compel him or said Robert Forsythe to pay money to relieve said lots therefrom, caused a writ of fieri facias to be issued out of the clerk's office of the circuit court of the United States for the northern district of Illinois, on said judgment they had recovered against said
82 Brown & Forsythe, in 1866, and to be levied by the United States marshal of said district on said three lots, as the property of said Robert Forsythe; and that such proceedings were had and taken by said marshal under said writ; that said lots were pretended to be sold thereunder to said Brandies & Crawford on or about the seventh day of June, A. D. 1878, at & for the sum of $11,600, being the amount of said judgment, interest, & costs, or thereabouts; and a certificate of sale was issued and given by said marshal to said Brandies & Crawford, in pursuance of such pretended sale; and after expiration of the statutory time of redemption, to wit, on or about the ninth day of September, 1871, Benjamin H. Campbell, then marshal of said district, executed to said Brandies & Crawford a marshal's deed of said lots 4, 5, & 6, upon said pretended sale, and they have since that time claimed, and still claim, ownership of said lots by virtue thereof.

Your orator further shows unto your honors that it is solely & only under said pretended marshal's sale & deed that said complainant's claim any right or interest in or to said three lots last described, or either of them, and it is the pretended title thus derived which they seek to enforce and quiet through their original bill filed in this cause. And your orator charges and insists that said complainants have no legal or equitable claim to said lots 4, 5, & 6, or either of them or
83 any part thereof, as against your orator's rights, for the reason that soon after the recovery of said judgment in their favor against said Brown & Forsythe, said Robert Forsythe by adjudication of the district court of the United States for the northern district of Illinois, was declared a bankrupt under the bankrupt law of the United States, and was soon thereafter, and in the year 1868, as your orator is informed and believes, granted a discharge by said court in due course of law from all his debts, including said judgment, so that at the time of the issuing of said writ of fieri facias thereon in May, 1870, on which said pretended sale was made by said marshal, and at the time of said pretended sale by said United States marshal, and at the time of making said certificate of sale and marshal's deed, said judgment was fully satisfied and discharged in the law so far the same was or had been a debt against said bankrupt, and all the proceedings of said marshal, and of said complainants in selling under execution & purchasing there-

under and in making and accepting a certificate of such sale & deed in pursuance thereof, were unauthorized & void and fraudulent as against the rights of your orator.

And your orator further shows that said complainants to avoid the effect of the discharge of said bankrupt from his debts, and to
84 sustain their pretended title acquired as aforesaid, sometimes pretend and give out that their said judgment against said Brown & Forsythe was not discharged against said Robert Forsythe by his discharge in bankruptcy as aforesaid, because they say that the same was founded on some relation of trust or special confidence between them and said Brown & Forsythe, and was of such a nature that it was *accepted* by the bankrupt law from its operation in that respect; whereas your orator charges that all such pretences and allegations are untrue, and that if there were any fiduciary or trust relations that would take said indebtedness to said complainants out of the operation of the bankrupt law as to discharge of the debtor (which your orator does not admit to be the case), such relations existed only between said complainants and said Brown, the copartner of said Robert Forsythe, and not in any manner between the complainants and said Robert Forsythe. And your orator further charges and insists that said indebtedness from said Forsythe & Brown to said complainants was only for a balance of moneys due to said complainants upon account in ordinary commercial transactions, and that there was nothing in its character to prevent the discharge of said judgment under operation of the bankrupt law as to said Robert Forsythe.

85 Your orator further shows unto your honors that, as he is informed and believes, said Brandies & Crawford caused no demand to be made on said Robert Forsythe, upon said execution issued on said judgment, for payment thereof, or for property, and never set up or claimed from him payment of said judgment, or that he was liable thereon, after his said discharge in bankruptcy; that they managed the business of issuing execution and making sale thereunder, as hereinbefore stated, quietly and secretly, so far as they could do so, in order that neither said Robert Forsythe nor your orator might have knowledge thereof, and so that no proceedings might be taken to prevent the consummation of their scheme to obtain a pretended title to said lots 4, 5, & 6 through a marshal's deed. And neither said Robert Forsythe nor your orator had any knowledge or intimation of such proceedings by said complainants or the marshals until long after the making of said marshal's deed.

And your orator charges that, even if said judgment might have been excepted from the operation of the bankrupt law, so as not to be discharged thereby, by reason of any relations of said Robert Forsythe to said complainants, or from any cause not appearing of record (which your orator does not admit to have been so), yet in that case it
86 was incumbent upon said complainants, in making proof of their demand against said bankrupt or in some other manner, to set up and claim such exception of their said demand from the operation of the bankrupt law, which was never done by them, as your orator is informed and believes. That said complainants brought suit on their said demand against said Forsythe & Brown as a simple balance of commercial account, and recovered judgment therein, proved said judgment as a claim against the estate of said Forsythe in bankruptcy, joined other of his creditors in resisting his application for discharge from his debts by the court, which discharge was granted notwithstanding such resistance, and never claimed or pretended that the character of such

indebtedness of said Forsythe to them was such that he was not entitled to a discharge therefrom in bankruptcy until such claim and pretence was set up in the bill of complaint filed by them in this case. And your orator insists that said complainants, by thus neglecting to assert any right (if they had any, which your orator does not admit) to have their said judgment excepted from the operation of the bankrupt law, as to said Forsythe, must be held to have acquiesced in the order of the court granting to said Forsythe a full discharge from all his
87 debts, including said judgment, and that they had no right or authority, without special application to the court first made in some form for that purpose, to have execution issued on said judgment and a levy and sale made thereunder, as was done by them, as hereinbefore stated and set forth.

Your orator further shows unto your honors that prior to the time when said Nathan Corwith acquired title to said lots 4, 5, & 6 by deed from William R. Arthur, trustee, such title in fee was held by said Arthur, as trustee, upon the trust; amongst other things, that upon the order or request in writing of said Robert Forsythe and his wife, Mary E. Forsythe, jointly, said Arthur should convey said premises to such person or persons as they might so designate in fee; that such written order or request was so made by said Robert and Mary E. Forsythe that said trustee would convey said lots to said Nathan Corwith in fee simple absolute on or about the third day of November, A. D. 1869, and in pursuance thereof said Arthur, as such trustee, conveyed said lots, by deed bearing date the 4th day of January, A. D. 1870, to said Nathan Corwith; that by such deed of conveyance said Corwith, at the date last aforesaid, became seized of said lots in fee to the
88 exclusion of any judgment or other lien growing out of or on account of any transactions or indebtedness of said Robert Forsythe, whatever the consideration may have been for such conveyance. And your orator charges, on information and belief, that the real consideration for such conveyance from said Arthur to said Corwith, was the loaning & advancing by said Corwith to said Robert Forsythe of a large sum of money, the amount of which is unknown to your orator; but he believes it to have been about $12,000, that such indebtedness remained unpaid until in April, 1870, when your orator made the loan of $15,000 to said Robert Forsythe, and the money so borrowed was nearly all paid over directly to said Corwith, by your orator, to obtain from him the title to said lots, and put the same in proper condition as security to your orator for such loan; that under advice of counsel it was deemed best to have said Corwith convey the title to said lots to said Forsythe; and that he should execute the trust deed to said Scoville, as trustee, to secure your orator for said loan, and, accordingly, at one and the same time, and as one transaction the debt due to said Corwith was paid to him by your orator, he made and delivered to said Robert Forsythe a deed of conveyance of said three lots; and said Forsythe made and delivered to your orator his promissory notes described in the trust
89 and for the $15,000 loan and executed and delivered to said Scoville, as trustee, the deed of trust securing the same.

And your orator claims & insists that, even if it shall be held by the court in this case that said complainants had, or were entitled to a lien on said lots as the property of Robert Forsythe, under their said judgment against him, yet, as the right of said Corwith was superior and prior in law to that of said complainants under their said judgment (if any they had, which your orator does not admit), and your orator paid

the money due to said Corwith, he is entitled thereby to be subrogated to the rights of said Corwith, and in any event to be paid the whole amount of money so advanced and paid by him to said Corwith with interest, before the complainants should be permitted to have any benefit of their pretended judgment lien on said premises.

And your orator well hoped that said John Forsythe and said Brandies & Crawford would have accorded to your orator his just rights in & to said premises, and every part thereof, and would not have set up or claimed any rights or interests therein adverse to your orator's right and title thereto, derived as aforesaid, but now so it is, may it please your honors, that the said defendants combining and confederating
90 together and with divers other persons unknown to your orator, but whose names when discovered your orator prays for leave to insert herein as defendants, with proper and apt words to charge them in that behalf, how to injure your orator, refuse to give up possession of said premises & every part thereof to your orator, but wrongfully detain the same from him, and said John Forsythe refuses to convey to your orator, or to release his tax title, or tax claims to said premises, and said Brandies & Crawford refuse to convey to your orator or to release said premises from their said pretended title, derived under said marshal's deed; and inasmuch as said several claims of said defendants constitute clouds on your orator's title and interest in and to said premises, which he is entitled to have removed, and he has no adequate relief at law, and can only have a full remedy in equity; to the end, therefore, that the said defendants may full, true, and perfect answer, make to all and singular the allegations and charges herein as fully and particularly as if the same were here again repeated, and they specially interrogated thereto, without oath, the oath of each of them to their answers being hereby waived, and that said John Forsythe & all persons claiming under him may be decreed to surrender possession
91 of said premises to your orator, and may be required to account for and pay over the rents that have accrued, or what would be a reasonable rent for use and occupation of said premises, since your orator acquired title thereto, to wit, since the first of May, 1876; and that he and all the defendants may be required to convey to your orator whatever right or interest they may claim to have in or to said premises adverse to your orator, by a short date to be fixed, & in default thereof that the master in chancery of this court be directed to make such conveyance, and that your orator's right and title to said premises and every part thereof may be confirmed and established, and that your orator may have such further, other, and different relief as the nature of the case may require, and as may be agreeable to equity:

Your orator prays that the writ of subpœna may issue to said defendants, according to the rules and practice of this honorable court; and your orator will ever pray, &c.

JOHN COCHRANE,
Complainant.
By GEO. SCOVILLE,
His Sol'r.

SCOVILLE & BAYLEY,
Sol'rs & of Counsel.

92 EXHIBIT A.

Examination of title to lots 4, 5, & 6 in E. L. Sherman's subd'n of lots 4, 5, and 6 in block 1 of Clark's add'n to Chicago.—Last search made Feb. 15, 1870, by Jones and Sellers.

William R Arthur to Nathan Corwith. (815 stamp.) Deed dated Jan'y 4, 1870. Whereas, on or about M'ch 30, 1861, by deed of that date, Horatio G. Loomis conveyed to s'd Arthur, in trust for certain purposes in said deed mentioned, lots 4, 5, and 6 of E. L. Sherman's subd'n of lots 4, 5, and 6 in block 1 of Clark's add'n to Chicago, which deed is recorded in the recorder's office of Cook Co., Ills., in book 210 of deeds on p'g 365;

And whereas it was provided in said deed, that upon the order or request in writing of Robt. Forsythe and Mary E. Forsythe, his wife, jointly, s'd Arthur should convey s'd premises to such person or persons as they might designate;

And whereas, on Nov. 3, 1869, s'd Mary E. and Robert Forsythe served upon s'd Arthur the following notice in writing (here follows in substance this):

CHICAGO, *Nov. 3d*, 1869.

WM. R. ARTHUR:

DEAR SIR: Whereas Horatio G. Loomis, by deed dated Mch. 30, 1861, conveyed to you in trust for certain purposes in said deed
93 mentioned lots 4, 5, and 6 of E. L. Sherman's subd'n of lots 4, 5, and 6 in block 1 of Clark's add'n to the city of Chicago;

And whereas it is provided in substance in said deed that upon an order or request in writing jointly you should convey said premises to such person or persons as we might designate; and whereas, it was our intention that upon such request you should make such conveyance in fee-simple absolute, and that event the other trusts in said deed mentioned should be cast off & forever cease; and whereas, a mistake or omission occurred in the drawing of said deed, by reason of which our authority to compel you to execute such deed & cut off said trusts is doubtful;

And whereas, we, with H. G. Loomis, at the Nov. term of the superior court of Chicago, A. D. 1869, commenced a suit in chancery against you, & Leonard E. Forsythe, Rob't Forsythe, Isaac Forsythe, Lydia T. Warrack, James Warrack, Philip A. Warrack, Mary E. Warrack, Helen M. Warrack for the purpose of correcting and reforming said deed so as to accord with our intention and direction as stated in said bill;

Now, therefore, whenever and as soon as said court shall decree that said be reformed as prayed, then, and in that event we hereby request you to make a good and sufficient conveyance of said
94 premises in fee simple absolute to Nathan Corwith, in pursuance of the terms and conditions of such reformed deed as soon as the same shall be executed in pursuance of the decree of said court, the deed so sought to be reformed being the one recorded in book 210 of deeds, on pg. 365.

Chicago, Nov. 3d, 1869.

M. E. FORSYTHE. [SEAL.]
ROB'T FORSYTHE. [SEAL.]

And whereas the decree mentioned in said notice has been rendered,

and Benjamin D. Magrander, one of the masters in chancery of said court, has executed a deed in pursuance of said decree and reformatory of said first-mentioned deed bearing date Nov. 6th, 1869, & "not yet recorded."

Now, therefore, said Arthur, in pursuance of the deed from Horatio G. Loomis to him, dated M'ch 30, 1862, & of the master's deed hereinbefore referred to, "reformatory of said deed," & of the decree referred to in said master's deed, & of the request in writing above shown from Robert Forsythe & Mary E. his wife, and in consideration of $1 sells, conveys, quitclaims, &c., to s'd Corwith, his heirs, &c., all the right, title, interest, &c., he (Arthur) has in and to the following-described premises by virtue of the above-mentioned deeds and proceedings, to wit, lots 4, 5, and 6 of E. L. Sherman's subd'n of lots 4, 5, and 6 in block 1 of Clark's add'n to the city of Chicago, said add'n being a part of the S. W. frac'l ¼ of sec. 22, T. 39 N., R. 14 E., in Cook Co., Ills. Covenant against acts of Arthur.

95 (Signed) W. R. ARTHUR, *Trustee.* [SEAL.]

Ack'g'd Jan'y 5, 1870. Filed for record March 15, 1870.

Nathan Corwith & Mary E., his wife, to Robert Forsythe. (Stamps' $15.) Q. C. deed, dated March 12, 1870, consid'n $15,000, conveys lots 4, 5, and 6 in E. L. Sherman's subd'n of lots 4, 5, and 6 in block 1 of Clark's add'n to the city of Chicago, in Cook Co., Ills. Homestead rights relinquished. Ack'g'd M'ch 14, 1870. Filed for record M'ch 15, 1870.

ENCUMBRANCE.

Robert Forsythe (widower) to George Scoville. (Stamps, $15.) Trust-deed, dated M'ch 10, 1870. Whereas Rob't Forsythe has executed one note, bearing even date herewith, payable to the order of John Cochrane, 5 y'rs after the date thereof, for $15,000; also 10 other notes, bearing even date herewith, payable to the order of John Cochrane, given for interest, each for $676, & due as follows: 6, 12, 18, 24, 30, 36, 42, 48, 54, & 60 months after the dates thereof, all of said notes payable at the National Bank of Commerce, New York City, with int., after due, at 9 per cent. per annum.

Now, to secure payment, &c., conveys lands in the city of Chicago, Cook Co., Ills., to wit, lots 4, 5, & 6 of E. L. Sherman's subd'n of lots 4, 5, & 6, in block 1 of Clark's add'n to the city of Chicago,

96 said add'n being a part of the SW. frac'l ¼ of sec. 22, T. 39 N., R. 14 E., in Cook Co., Ills. For covenants to pay taxes, insure buildings, &c., & for power of sale, see record. Homestead rights waived. Ack'g'd M'ch 15, 1870.

Filed for record M'ch 15, 1870. No search made.

CHASE BROS. & CO.

(Endorsed:) Filed Oct. 14, 1876. Wm. H. Bradley, cl'k.

(Exhibit B, referred to in the foregoing answer, is same as Exhibit A, page 52 of this transcript.)

WM. H. BRADLEY, *Clerk.*

97 Afterwards, to wit, on the twenty-fifth day of October, A. D. 1876, came James D. Wallace, Robert Forsythe, and John Forsythe, by their solicitors, and entered their appearance as defendants

to the cross-bill of John Cochrane in said cause, which said appearance is in the words and figures following, to wit:

Appearance.

In the circuit court of the United States, northern district of Illinois. In equity.

ADOLPHUS BRANDIES & WILLIAM W. CRAWFORD *vs.* JAMES D. WALLACE & ROBERT FORSYTH. } Original bill.

JOHN COCHRANE *vs.* ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, James D. Wallace, Robert Forsyth, & John Forsyth. } Cross-bill.

We hereby enter the appearance of James D. Wallace, Robert Forsyth, & John Forsyth in this case as defendants to the cross-bill filed by John Cochrane.

Chicago, Oct. 21, 1876.

GOUDY, CHANDLER & SKINNER,
Sol'rs for said Defendants.

98 (Endorsed:) Filed Oct. 25, 1876. Wm. H. Bradley, cl'k.

99 Afterwards, to wit, on the fourteenth day of December, A. D. 1876, came the parties, by their solicitors, and filed their stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

United States circuit court for the northern district of Illinois. In chancery.

ADOLPHUS BRANDIES & WILLIAM W. CRAWford *vs.* ROBERT FORSYTHE & JAMES D. WALLACE. } Original bill.

and

JOHN COCHRANE *vs.* ADOLPHUS BRANDIES, WILLIAM W. CRAWford, Robert Forsythe, James D. Wallace, & John Forsythe. } Cross bill.

It is agreed and stipulated that the complainant in the cross-bill herein may proceed forthwith to take testimony in support of said cross-bill, to be used as evidence on the hearing, the same as though defend-
100 ants to said cross-bill had filed their answers thereto and the issues been made up upon such cross-bill; such testimony to be taken at such time and place and before such persons as the solicitors

of the complainant in said cross-bill shall appoint, and give us at least two days' notice of such appointment.

Chicago, Dec. 11th, 1876.

CRAWFORD & McCONNEL,
Solicitors for Brandies & Crawford.
GOUDY, CHANDLER & SKINNER,
Sol'rs for other Defendants.

(Endorsed:) Filed Dec. 14, 1876. Wm. H. Bradley, cl'k.

And on that same day, to wit, the fourteenth day of December, A. D. 1876, in the record of the proceedings of said court in said entitled cause before the honorable Henry W. Blodgett, district judge, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL. *vs.* JAMES D. WALLACE ET AL. } In chancery.

On motion complainants in the cross-bill, by George Scoville, esq., their solicitor, it is ordered by the court that Allen Boyer, esq., of Chicago, Illinois, be, and he is hereby, appointed a special examiner to take
101 proofs herein, and report the same to the court. And on motion the defendants in the cross-bill are ruled to answer said cross-bill in ten days.

Afterward, to wit, on the seventeenth day of January, A. D. 1877, in the record of the proceedings of said court in said entitled cause before the honorable Henry W. Blodgett, district judge, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL. *vs.* JAMES D. WALLACE ET AL., } In chancery. Original bill.

and

JOHN COCHRANE *vs.* ADOLPHUS BRANDIES ET AL. } Cross bill.

Now comes the complainant in the cross-bill, by his solicitors, and it appearing to the court that John Forsythe, Robert Forsythe, and James D. Wallace, defendants in the cross-bill filed herein by John Cochrane, had failed to answer said cross-bill, in conformity with the rules and practice of this court, and they, being each now three times solemnly called, come not, but make default: It is thereupon considered by the court that their defaults be entered, and that the said cross-bill and the matters and things therein contained be taken as confessed and true as against them.

102 Afterward, to wit, on the twelfth day of March, A. D. 1877, in the record of the proceedings of said court, in said entitled cause, before the honorable Henry W. Blodgett, district judge, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL.
vs.
JAMES D. WALLACE ET AL. } In chancery.

Now comes Mr. McConnell, solicitor, and suggests to the court the death of the defendant, William W. Crawford, and thereupon, on motion, it is ordered that William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida Crawford, and Rosanna Crawford be made defendants herein, in place of said William W. Crawford, deceased, in the original and cross-bill herein, and thereupon leave is given Adolphus Brandies and said new defendants to file their answer to the cross-bill herein.

103 Afterwards, to wit, on the twelfth day of March, A. D. 1877, came Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, and Rosanna, by their solicitors, and filed their answer to the cross-bill of John Cochrane, in said cause, which said answer is in the words and figures following, to wit:

Answer.

In the United States circuit court for the northern district of Illinois, *ss.*

To the honorable judges of said court:

The answer of Adolphus Brandies and William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, and Rosanna Crawford to the cross-bill of John Cochrane, complainant.

The said defendants reserving to themselves all benefits and advantages of exceptions to the many errors and uncertainties in the said cross-bill contained, for answer thereto, or to so much thereof as they are advised it is necessary for them to make answer unto, say, that the respondents Adolphus Brandies and William W. Crawford, his partner, now deceased, were, in the month of September, A. D. 1865, before and long time afterward associated together as partners, and
104 doing business in the city of Louisville, in the State of Kentucky in the firm name and style of Brandies and Crawford; and these respondents further show that said Brandies and said Crawford being such copartners together, in the month of September, 1865, one Robert Forsythe and one George T. Brown, who were doing business together in the city of Chicago, as commission merchants, in the purchase and shipment of grain and other articles upon orders from customers, that in the said month of July, 1865, the said Forsythe and Brown were directed and instructed by the said Brandies and Crawford to purchase to and for the account of said Brandies and Crawford a large quantity of wheat to be shipped to the mill of the said Brandies and Crawford, situated in the city of Madison, Indiana, to wit, about 6,000 bushels, and the said Brandies and Crawford were advised by said Forsythe and Brown that they had made such purchase as directed by them, and thereupon, upon the request and demand of said Forsythe and Brown the said Brandies and Crawford paid over to the said Forsythe and Brown the sum of $9,665.00, which the said commission merchants then and there represented and stated to the said Brandies and Crawford were the actual market price for the wheat which had been

by them purchased as factors for the said Brandies and Craw-
105 ford, and thereupon the said Brandies and Crawford directed the said Forsythe and Brown to ship the said wheat to Madison, Indiana, but the said commission merchants wholly disregarding their duty in the premises failed, neglected, and refused to ship the said wheat as directed, but without the knowledge of the said Brandies and Crawford sold the said wheat and converted the proceeds thereof to their own use, and they never since hitherto paid any portion thereof to the said Brandies and Crawford, or to either or to the personal representatives of either.

Further answering, these respondents say that the said Brandies and Crawford afterwards instituted in this court an action for the recovery of the value of their property sold as aforesaid and converted by the said Forsythe and Brown as aforesaid, and such proceedings were afterwards had that in the month of March, 1866, the said Brandies and Crawford did by the consideration of this court receive judgment for damages for the said fraudulent conversion aforesaid against said Robert Forsythe and George T. Brown in the sum of $9,966.49, and costs of suits, which said judgment remains unreversed and wholly unsatisfied and in full force, except by the marshal's sale as hereinafter set forth.

These respondents, further answering, show that immediately
106 after the rendition of the said judgment against said Forsythe and Brown that a writ of fieri facias was issued thereupon to the marshal/s for this district, but which writ in the year 1866, was returned by said marshal/ unsatisfied and not levied, as stated in said return, because there was no property of the defendants or either of them in said district on which to levy.

Further answering, these respondents show that in the year 1861, the said Robert Forsythe with his own means purchased the following real estate in Cook County, Illinois, namely, lots four, five, and six, of E. L. Sherman's subdivision of lots four, five, and six, in block one in Clark's addition to Chicago, said addition being the southwest fractional quarter of section twenty-two, township thirty-seven north, of range fourteen east of the third principal meridian, and upon such purchase procured the vender of said property instead of executing a conveyance directly to the said Forsythe, but executed and delivered to one William R. Arthur a conveyance of the said property, as trustee only, and to have and hold the same in trust, to permit Mary E. Forsythe, the then wife of Robert Forsythe, to use, occupy, and enjoy, and receive the rents and profits of said property for her life, and to her own use and at any and at all times, upon the order and request in writing of said
107 Mary E. Forsythe and said Robert Forsythe jointly, to convey said lots or either of them as they may designate; and in case the said Mary E. Forsythe should die without issue in the lifetime of her husband then to convey said lands to Forsythe for life immediately after the decease of said Mary E. Forsythe, to him for life, and to his children lawfully begotten, in fee simple; and if said Robert Forsythe should die without issue, then to the children of his brother, Leonard E. Forsythe, and the children of Lydia T. Warrack who may be in being at the time of said Robert's death; and furthermore that in the case of the death of Robert, in the lifetime of said Mary E., without lawful issue, then to convey said property to her for life, and to the children of said Leonard E. Forsythe and of Lydia T. Warrack in being at the time of her decease in fee simple and in remainder, which said conveyance from Ho-

ratio G. Loomis to William R. Arthur is dated March 30, 1861, and recorded on the same day in book 210, page 365.

Further answering, these respondents show that after the said conveyance, the said Robert Forsythe, with his own means exclusively, proceeded to enclose the said property and improve the same; and at the expenditure of about $25,000.00 erected a large brick dwelling-
108 house and outbuildings upon the said premises, and at the date of the rendition of the said judgment in this court, in favor of the said Brandies and Crawford against said Forsythe and Brown, the said Robert Forsythe was in the occupation of the said dwelling-house and property, and the said Mary E. Forsythe was then in full life, and the said William T. Arthur had never conveyed said property nor any part thereof, nor had the said Robert and Mary Forsythe at any time prior to the rendition of the said judgment made any request or any direction for said Arthur to convey the said property as set forth in said deed of trust.

And afterwards, to wit, in the year 1869, the said Horatio G. Loomis filed a bill in chancery against William R. Arthur, Leonard E. Forsyth, Robert Forsyth, Isaac Forsyth, Lydia T. Warrack, James Warrack, Philipp A. Warrack, Mary E. Warrack, and Helen M. Warrack, defendants, in the superior court of Chicago, in Cook County, Illinois, and such proceedings were afterwards had therein that, by virtue of a decree rendered therein, one Benjamin D. Magruder, as master in chancery of said court, executed a certain deed of correction of the said original conveyance to said Arthur, whereby it was provided that the said original conveyance to said Arthur should be reformed, and the
109 conveyance of said Arthur, on the request of said Robert and Mary E. Forsythe, should be in fee simple absolute and operate to cut off the several trusts hereinafter specified in said original conveyance, and said master's deed so made, executed, and delivered to said Arthur on November 6, 1869, was recorded in book 552 of Cook County Records, page 376.

And these respondents, further answering, show that on or about Nov. 3, 1869, the said Robert Forsyth and Mary E. Forsyth directed in writing that the said Arthur should convey the said premises to one Nathan Corwith in fee simple absolute, and thereupon the said Arthur, as such trustee, in pursuance of such trust of the original and reformatory deeds of Jan. 4, 1870, did make, execute, and deliver unto the said Nathan Corwith a conveyance in fee simple absolute of all and singular the said property aforesaid, which was duly recorded in book 553 of Cook County Records, page 270.

Further answering, these respondents would show that although the said conveyance recites a consideration of one dollar, yet, in truth and in fact, the said Robert Forsyth was indebted unto said Nathan Corwith in the sum of $5,000.00, and that the said conveyance was in reality only intended as a mortgage, and was made and received with the distinct understanding and agreement that when the said
110 Corwith should receive the full payment of such indebtedness to him that he would reconvey the property in fee simple to said Robert Forsythe. Presently after the said mortgage the said Nathan Corwith and wife, on March 12, 1870, signed, sealed, and delivered unto the said Robert Forsyth a conveyance quitclaiming to the said Forsyth all and singular the said property for the apparent consideration of $5,000.00, but in reality, as these respondents are advised and *and* believe, the only consideration was the payment by said Forsyth to Corwith of the said indebtedness due to him from said Forsyth. The

said conveyance to said Forsyth was duly recorded in book 586 of Cook Co. Records, page 25.

And further answering, these respondents say that on May 9, 1870, the said Brandies and Crawford caused an alias writ of fieri facias to be sued out upon their said judgment against the said Forsyth and Brown, and the said writ was duly sealed with the seal and tested by the clerk of this court, directed to the marshall of this district and commanding him to levy the said writ upon the property and estate of said execution debtors, and the marshall having in due and strict conformity to law levied upon said property so conveyed to said Forsyth,
111 did proceed on January 7, 1871, to make sale of the said property according to law, and the said real estate was purchased by the said Adolphus Brandies and William W. Crawford for the sum of $11,600.00, and neither the said Forsyth nor any other person having made redemption of the same as provided by law, the said marshall on September 9, 1871, did make, execute, acknowledge, and deliver unto the said Brandies and Crawford a conveyance for the said premises, a copy of which is filed herewith, which was recorded in book 640, page 639, on September 12, 1871.

Further answering, these respondents neither admit nor deny that in the month of March, 1870, the said Robert Forsyth applied for a loan of money in the amount of $15,000.00 to the said cross-complainant, or that he furnished an abstract of title, or that the same was examined, or that any particular opinion was expressed by lawyers as to the validity of the title of the said Robert Forsyth, but they leave all such allegations of that character to be proven by the cross-complainant at the hearing; but these respondents deny that the said John Cochrane, complainant, or the said Scoville, who took as trustee for the benefit of said John Cochrane in the deed of trust executed some time in
112 the year 1870, was not acquainted with the fact that the said Brandies and Crawford recovered a judgment against Robert Forsyth and the said James T. Brown in March, A. D. 1866, and that they claimed that the said judgment was a lien on said property in question, but these respondents charge that the said Scoville and the said John Cochrane were fully informed that the said Brandies and Crawford claimed that the said judgment was a lien on the said real estate heretofore described at the time when said Robert Forsythe executed a deed of trust of said real estate to the said George Scoville for the use and benefit of the said John Cochrane.

These respondents admit that under the provisions of the said deed of trust, the said George Scoville had advertised and sold the said premises on the 17 day of April, A. D. 1872, and that the said premises, at such sale, were sold by the said Scoville to James D. Wallace; but these respondents charge that at the time of such sale the said James D. Wallace was informed of the judgment aforesaid of the said Brandies and Crawford, that they had sued out execution in the same, and set a sale thereunder by the marshall of this district, the said Brandies and Crawford had bought the said property, and claimed title
113 to and the ownership thereof.

These respondents further answering, say that they know nothing of any arrangement made between John Forsyth and the complainant, John Cochrane; but that they leave all the allegations of said cross-bill in reference thereto to be proved at the hearing by the complainant.

These respondents further answering, deny that the said Brandies and

Crawford caused no demand to be made on the said Robert Forsyth upon the said execution issued on their judgment, or for property in payment of said judgment, or that he was lawfully un his said discharge in bankruptcy; they deny that they managed the business of suing out the said execution, and making sale thereunder quietly and secretly, so far as they could, in order that neither the said Robert Forsyth nor the said complainant might have knowledge thereof; but these respondents would show that the said Brandies and Crawford had always claimed, as these respondents do now, that the said judgment was for the fraudulent conversion of the property of said Brandies and Crawford, and that it was unaffected by the said Robert Forsyth's discharge in bankruptcy, and they deny that the complainant or the said Robert Forsyth was without notice of the proceedings of the said Brandies and Crawford.

114 Further answering, they deny the allegations of the said cross-bill, that the original claim of the said Brandes and Crawford against said Forsyth and Brown, was for a mere balance on commercial account, but they charge that the same was a claim against the said Forsyth and Brown, for the fraudulent conversion of property belonging to the said Brandes and Crawford, and they deny the averment of the said bill, that the said indebtedness to Brandes and Crawford was the indebtedness of James T. Brown alone, but they charge the fact to be that the said indebtedness was joint, and that it was the indebtedness of the firm of said Forsythe and Brown.

Further answering, these respondents show that they were entirely ignorant of the bankruptcy proceedings in which the said Robert Forsyth was adjudicated a bankrupt, and from which he obtained a discharge, and they show that they only learned of the same some months after the said Robert obtained his discharge. And these respondents, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, and Rosanna Crawford, widow of William W. Crawford, the original complainant, answering, say that they are the only heirs of the said William W. Crawford, deceased, the co-partner while living of Adolphus Brandies and joint owner with him of the real estate in controversy.

115

And further answering, these respondents say that the said William W. Crawford, by his last will and testament, devised to the said Rosanna Crawford, after all his debts should be paid, a one-third interest in all real estate and other property, and to his other heirs he devised the other two-thirds of such real estate and other property, share and share alike.

And further answering, these respondents say that by the appointment of said last will and testament, the respondents William W. Crawford and Charles H. Crawford were executers of said William W. Crawford, deceased, and that they have been duly qualified and are acting as such executers.

All other matter and things alleged by the said cross-complainant in his said bill of complaint, these respondents neither admit nor deny, being ignorant thereof, but leave such matters and things to be shown by proof on the trial of this cause; and now, having fully answered all and

singular the allegations in said bill, these respondents pray to be hence dismissed with their reasonable costs in this behalf sustained.

ADOLPHUS BRANDIES,
WILLIAM W. CRAWFORD,
CHARLES H. CRAWFORD,
116 ARTHUR S. CRAWFORD,
IDA E. CRAWFORD, AND
ROSANNA CRAWFORD.

By CRAWFORD & MCCONNELL,
Their Solicitors.

(Endorsed:) Filed March 12, 1877. Wm. H. Bradley, cl'k.

117 Afterwards, to wit, on the fourth day of April, A. D. 1877, came the complainant in the cross-bill by his solicitor and filed his replication to the answer to said cross-bill in said cause, which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States.

ADOLPHUS BRANDIES ET AL.
vs.
ROBERT FORSYTHE ET AL. } Original bill.

JOHN COCHRANE
vs.
ADOLPHUS BRANDIES ET AL. } Cross-bill.

The replication of John Cochrane, complainant in said cross-bill, to the answer of Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, and Rosanna Crawford, defendants, to said cross-bill filed in this cause.

This replicant saving and reserving unto himself all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto, says that he will aver and prove his said cross-bill to be true and sufficient in the law to be answered unto, and
118 that the said answer of said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in said answer contained, material or effectual in the law to be applied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said cross-bill he has already prayed.

SCOVILLE & BAYLEY,
Sol'rs for John Cochrane.

(Endorsed:) Filed Ap'l 4, 1877. W. H. Bradley, cl'k.

Afterwards, to wit, on the fifteenth day of January, A. D. 1878, in the record of the proceedings of said court in said entitled cause, before the honorable Thomas Drummond, circuit judge, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL.
vs.
ROBERT FORSYTHE ET AL. } In chancery. Original bill.

and

JOHN COCHRANE
vs.
ROBERT FORSYTHE ET AL. } Cross-bill.

119 And now comes John Cochrane, complainant in the cross-bill filed in this cause, by George Scoville, his solicitor, and due notice of this application having been given, and it appearing to the court that a proper case is shown therefor, it is ordered, on motion of said cross-complainant, that Robert C. Wright be, and he is hereby, appointed receiver in this cause, with the usual powers of receivers in courts of equity, upon giving bond in the sum of one thousand dollars, to be approved by the court. And said receiver shall have power to lease and collect and receive rents for the premises described in the bill in this case until the further order of the court in this cause, and he shall make report from time to time to the court of his doings as such receiver.

Afterwards, to wit, on the fifth day of February, A. D. 1878, in the record of the proceedings of said court in said entitled cause, before the honorable Thomas Drummond, circuit judge, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL.
vs.
ROBERT FORSYTHE ET AL. } In chancery. Original bill.

and

JOHN COCHRANE
vs.
ADOLPHUS BRANDIES ET AL. } Cross-bill.

120 And now comes the receiver heretofore appointed in this cause, by Geo. Scoville, his solicitor, and the defendant, Robert Forsythe, by W. C. Goudy, his solicitor, and it being represented to the court that fifty dollars a month is a reasonable sum for use and occupation of the premises described in the bill of complaint in this cause, which are now occupied by said Forsythe, and he being willing to pay at that rate, from and after the first day of February, A. D. 1878, for such use and occupation, subject to final order of the court as to the rights of all persons to such moneys, it is ordered that said receiver take and hold such moneys until the further order of this court, from said Forsythe, so long as he shall occupy said premises, but the said Forsythe protests that neither of the parties to this suit are entitled to such rents.

Afterwards, to wit, on the twenty-first day of May, A. D. 1878, in the record of the proceedings of said court in said entitled cause, before the honorable Thomas Drummond, circuit judge, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL.
vs.
ROBERT FORSYTHE ET AL. } In chancery. Original bill.

and

JOHN COCHRANE
vs.
ROBERT FORSYTHE ET AL. } Cross-bill.

121 An application of John Cochrane, complainant in the cross-bill in this case, by his solicitor, due notice thereof having been given to opposite parties or their solicitors, it is ordered that the receiver heretofore appointed in this case, Robert C. Wright, apply so much of the rents collected and to be collected by him as he may deem necessary in construction or repair of side-walk in front of the premises described in the bill and cross-bill in this case, and the balance of such rents or so much thereof as may be necessary that he apply towards payment of taxes on said premises until the further order of this court.

Afterward, to wit, on the twenty-fourth day of December, A. D. 1878, in the record of the proceedings of said court in said entitled cause, before the honorable Henry W. Blodgett, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL.
vs.
ROBERT FORSYTHE ET AL. } In chancery. Original bill.

and

JOHN COCHRANE
vs.
ADOLPHUS BRANDIES ET AL. } Cross-bill.

And now comes Robert C. Wright, receiver heretofore appointed in this case to collect rents of the premises in controversy in this suit, by Geo. Scoville, esq., his solicitor, and files his report showing
122 such rents collected to amount of four hundred and fifty dollars, and disbursements to amount of fifty-two dollars and ninety-four cents, which report is approved and confirmed, and due notice of this application having been given to all parties interested, it is ordered that receiver pay as fees to his solicitor in this matter twenty-five dollars; that he retain for his own compensation twenty-two dollars and fifty cents, and pay over the balance left in his hands, to wit, three hundred sixty-four dollars and fifty-six cents, to the complainant in the cross-bill, John Cochrane, on account of taxes paid by him on premises in controversy.

Afterward, to wit, on the second day of August, A. D. 1879, in the record of the proceedings of said court in said entitled cause, before the honorable Thomas Drummond, circuit judge, appears the following entry, to wit:

United States circuit court, northern district of Illinois.

SATURDAY, *August 2nd, A. D.* 1879.

Present Hon. Thomas Drummond, judge.

ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, CHARLES H. CRAWFORD, ARTHUR S. CRAWFORD, IDA E. CRAWFORD, and ROSANNA CRAWFORD,
vs.
123 JAMES D. WALLACE, ROBERT FORSYTHE, and JOHN COCHRANE. } In chancery. Original bill.

and

JOHN COCHRANE
vs.
ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, JAMES D. WALLACE, ROBERT FORSYTHE, CHARLES H. CRAWFORD, ARTHUR S. CRAWFORD, IDA E. CRAWFORD, ROSANNA CRAWFORD, and JOHN FORSYTHE. } Cross-bill.

This cause having heretofore been brought to a final hearing upon the original bill of complaint, the answers thereto, and replications to such answers; and also upon the cross-bill of John Cochrane, one of the defendants in said original bill, and the answer thereto of Adolphus Brandies and others, and replication to said answer, and upon the depositions and proofs; the defendants James D. Wallace, Robert Forsythe, and John Forsythe, having made default in answering said cross-bill, and the same having been heretofore taken for confessed as to them. And the court having heard arguments of counsel and duly considered the case, doth find and determine that the complainants in said original bill of complaint are not entitled to relief; and it is therefore hereby ordered and decreed that said original bill of complaint be and the same is hereby dismissed for want of equity. And it further appearing to the court that the complainant in said cross-bill,
124 John Cochrane, is the lawful owner in fee of the premises in controversy in this suit to wit, of the south one-twenty-sixth part of lot number one, and lots numbered two, three, four, five, and six in E. L. Sherman's subdivision of lots four, five, and six of block one in Clark's addition to Chicago; said addition being a part of the south-west fractional quarter of section twenty-two, in township thirty-nine north, range fourteen east, of the third principal meridian, in the county of Cook and State of Illinois. And that said John Cochrane is entitled to the possession of said premises, which possession is now held by the defendant Robert Forsythe, he having entered into such possession without the consent or permission of said Cochrane, it is therefore hereby further ordered and decreed that said Robert Forsythe surrender and deliver up the possession of said premises to Robert C. Wright, receiver in this case, on or before the fifteenth day of August, A. D. 1879, and that said receiver thereupon deliver such possession to the cross-complainant, John Cochrane, his agent or attorney. And it further appearing to the court, from the report of Robert C. Wright, receiver, heretofore appointed by the court in this case to lease said premises and collect the rents thereof, that said Robert Forsythe has paid no rent for said premises for any part of the time since the month

of January, A. D. 1879, and that there is now due for such rent
125 fifty dollars per month from said Robert Forsythe for six months, to wit, for the months of February, March, April, May, June, and July, A. D. 1879, amounting to three hundred dollars, all which rents should be paid to said John Cochrane, as owner of said premises. It is therefore further hereby ordered and decreed that said Robert Forsythe pay to said John Cochrane, within thirty days after the entry of this decree, said sum of three hundred dollars, and in default thereof that execution issue to the marshal therefor as in case of a judgment at law.

And it further appearing to the court that the receiver has heretofore paid over to said John Cochrane all the rents collected by him from said Forsythe on account of taxes paid by said Cochrane on said premises, except such sums as have been paid under order of the court for expenses of such receivership, and for sidewalk, and except also the sum of one hundred dollars now in hands of said receiver.

It is therefore further ordered that he pay over such balance in his hands (less the sum of five dollars to be retained by him for his services, and fifteen dollars for his attorney's fees), being eighty dollars, to said John Cochrane. And said receiver producing in court here the receipt of said Cochrane therefor, it is ordered that he be discharged from further duty and liability as such receiver so soon as
126 he shall have received possession of said premises from said Robert Forsythe and turned the same over to said John Cochrane as herein directed. And the court further finds and decrees that the tax title to said premises acquired by said John Forsythe, one of the defendants in said cross-bill, by purchase at a tax sale made on or about the fourteenth day of November, A. D. 1870, for State and county taxes on said premises of the year A. D. 1869, and the certificate of such tax sale, and the tax deed obtained by said John Forsythe upon such certificate on or about the second day of April, A. D. 1873, and recorded in the recorder's office of Cook County, State of Illinois, of book number 232 of records, at page 119, are all fraudulent and void as against the said complainant in said cross-bill, and that he is entitled to have the claim of title under such tax sale certificate and deed removed from said premises as a cloud thereon. It is therefore further ordered, adjudged, and decreed that the said tax title be, and the same is hereby, set aside and held for naught; and that the said defendant, John Forsythe, and all persons claiming under or through him since the filing of said cross-bill be, and he and they are hereby, forever restrained and enjoined from asserting or setting up any claim of title, possession, or ownership to said premises or any part thereof, by
127 virtue of said tax sale or the certificate thereof, or of said tax deed as against the right and title of said complainant in said cross-bill. And it is further ordered, adjudged, and decreed that the costs of this suit to be taxed upon the original bill of complaint, and two-thirds of the costs taxed upon the cross-bill be paid by the complainants in said original bill, and that one-third of the costs so taxed on said cross-bill be paid by the defendant, John Forsythe, and that execution issue therefor. And thereupon the complainants in said original bill of complaint pray an appeal to the Supreme Court of the United States, which is granted upon their giving bond according to law.

128 The certificate of evidence and exhibits read on the hearing of said cause, and signed by the court is in the words and figures following, to wit:

Certificate of evidence.

In the circuit court of the United States, in the northern district of Illinois.

ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, and Rosanna Crawford, complainants,
vs.
JAMES D. WALLACE, ROBERT FORSYTHE, AND John Cochrane, defendants. } Bill.

and

JOHN COCHRANE, COMPLAINANT,
vs.
ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, Rosanna Crawford, Robert Forsythe, John Forsythe, and James D. Wallace, defendants. } Cross-bill.

129 Be it remembered that on the hearing of the above-entitled cause and cross-cause the complainants in the original bill of complaint to sustain the issues on their part offered and read in evithe following testimony to wit:

The deposition of William W. Crawford, filed May 26th, 1873, which said deposition is in the words and figures following, to wit:

130 The deposition of W. W. Crawford, of the city of Louisville and State of Kentucky, a witness of lawful age, produced, sworn, and examined upon his corporal oath on the 4th day of March, A. D. 1872, at the office of Henry Crawford, in the city of Chicago, in the county of Cook, and State of Illinois, by me, G. L. Barber, a notary public duly appointed to take the deposition of said witness in a certain suit now pending and undetermined in the United States circuit court for the northern district of Illinois, wherein Adolphus Brandeis and W. W. Crawford *is* plaintiff and Robert Forsyth and James D. Wallis *is* defendant.

The said witness, being first duly sworn by me to testify the truth, testified and deposed as follows:

UNITED STATES OF AMERICA,
Northern District of Illinois:

United States circuit court, northern district of Illinois.

ADOLPHUS BRANDEIS & W. W. CRAWFORD
vs.
ROBERT FORSYTH & JAMES D. WALLIS.

131 W. W. CRAWFORD, being first duly sworn was examined in chief by Mr. Crawford, and testified as follows:

HENRY CRAWFORD:

Q. State your name and residence.

A. W. W. Crawford; my residence is Louisville, Kentucky.
Q. With whom were you connected in business in 1865?
A. Adolphus Brandeis; firm name, "Brandeis & Crawford."
Q. Are you one of the complainants in this case?
A. I am.
Q. During the year 1865 did your firm have any dealings with a firm in Chicago and operating under the style of Forsyth & Brown?
A. We did.
Q. State about what time those transactions began and about what time they terminated.
A. My recollection is that 'he' commenced buying wheat for us some time in July for shipment to our mill at Madison, Indiana, where we were manufacturing flour at the time, and, as near as I can recollect, they terminated some time in the lat'er part of September or in October.
Q. In what business was the firm of Forsyth & Brown engaged in Chicago.
A. They were commission merchants.
Q. Had they any other occupation or business to your knowledge?
A. None that I know of.
132 Q. What transactions other than the purchasing of grain for your account did you have with the firm of Forsyth & Brown?
A. I had none except to purchase grain and ship to our mill at Madison.
Q. State whether, in the year 1865, the firm became indebted to the the firm of Brandeis & Crawford in any sum; and, if so, on what account?
A. Well, we ordered them to purchase grain for us at different times, and they purchased and shipped to our mill, and we ordered them to make another purchase which amounted to near ten thousand dollars, or quite, and they either drew on us at sight or we remitted them the amount, I think. I don't know which. I think they drew on us at sight, ten thousand dollars. The last amount remitted, or the last draft paid, was ten thousand dollars, and the winding up of our transactions the account showed due us nine thousand eight hundred and fourteen dollars and fifty-five cents, and we brought suit in 1866 and judgment was rendered for nine thousand six hundred and sixty-five dollars and forty-nine cents. I don't know how they figured the difference between the ninety-eight hundred and ninety-six hundred.
Q. Were you, or do firm of Forsyth in writing?
133 A. Yes; sometimes we telegraphed them. I think the last order we sent—the last two orders we sent them—we telegraphed to purchase a certain quantity of wheat.
Q. Have you any of the letters directed to your firm, coming from Forsyth & Brown?
A. Yes; I have several.
Q. Please produce them and annex them to your deposition.
A. The letters, however, my recollection is, relating to the last transaction, were filed in the suit. The draft, also, for the ten thousand dollars was filed in the suit of Brandeis & Crawford against Forsyth & Brown, and destroyed by the fire. These are some letters we have in relation to our business.
Q. Please state the title of the suit to which you refer, in what court it was brought, and who were your counsel?
A. The suit was—the style of the firm was—Brandeis & Crawford against Forsyth & Brown; Kales & Williams were our counsel, and I

think it was in the United States district court—circuit court or district.

Q. At where?

A. At Chicago.

Q. Do you remember the date of the judgment that you recovered in that action?

A. Well, it was in 1866. I don't know whether I have the exact date. I think I have, though, in the memorandum I made. It was some time in March, 1866, the judgment was rendered.

134 Q. Was there any other or different consideration for the indebtedness embraced in that judgment save the transactions that you have alluded to before?

A. None at all. We had no transactions with them, except we would send them orders to buy wheat for us, and, after making a purchase, we either remitted, or they drew on us at sight for money, which transaction was closed up as we went along.

Q. Did you have any occasion, or did you ever, in fact, examine the papers in that suit in the United circuit court previous to the fire of 1871?

A. The suit of Brandeis and Crawford against Forsyth & Brown?

Q. Yes.

A. I don't think I ever examined anything, except the papers that they filed in this bankrupt suit. The proof that we furnished Kales & Williams, or I was familiar with that at the time, the letters and papers.

Q. Has that judgment, or any part of it ever been paid; I mean in money?

A. Well, there was no money ever paid us on account of that judgment. We levied on a house and lot belonging to Robert Forsyth, and sold it and paid it in *in* March, or some time in 1870. We made the purchase June 20, 1870. We bought the property for eleven thousand six hundred dollars.

135 Q. As to the satisfaction of the judgment that resulted from that purchase, has it been in any manner paid or satisfied?

A. No; not a dollar of it.

Q. State whether you ever received any notification from the United States marshal of the United States district of Illinois as to the bankrupt proceedings instituted in the district court by Robert Forsyth?

A. No; we never received any notice from the marshal.

Q. State whether you ever made any proof of your debt in bankruptcy on this judgment?

A. None that I know of. I never made any, and I don't know that my partner ever did, for I never heard of it.

Q. Do you remember making an examination, in company with me, of the papers filed in the bankrupt suit—voluntary bankrupt suit—against Robert Forsyth?

A. I do.

Q. State what your address was put down in his schedule?

A. Brandeis & Crawford, Pittsburgh, Pennsylvania.

Q. State whether or not any papers purporting to be proofs of your debt, based upon this judgment, or in your favor, or any other indebtedness were on the files?

A. None that I saw.

Mr. GOUDY. Defendants object to all the testimony given which
136 purports to contain all papers or records, or all acts which ought to appear in writing, or of record.

Cross examination by Mr. GOUDY:

Q. Where is Brandeis?

A. He is in Vienna, Austria, or was the last I heard from him.

Q. Does he reside there?

A. No, sir.

Q. Where does he reside?

A. At Louisville, Kentucky. That is his place of residence last, and has been for twenty (20) years.

Q. Are you now in business with him?

A. No, sir; we have dissolved partnership.

Q. When did your connection cease?

A. About the first of August, 1872.

Q. Are you personally acquainted with either Forsyth or Brown?

A. I only know Mr. Forsyth by sight; I have been introduced to him; but I have seen Brown, yet I have no intimate acquaintance with him.

Q. When did you first see either of them?

A. My recollection is that I saw Forsyth as far back as 1861 or '2, when he was connected with the Illinois Central Railroad.

Q. How did the business connection commence between Brandeis & Crawford and Forsyth & Brown?

137 A. My recollection is that Mr. Shillcross, who was with us, came up here to make some arrangement for buying wheat for the mill, and he was introduced to them by some friend of theirs or his, and he made the arrangement that they were to buy wheat for us.

Q. Was he a partner of yours?

A. He was only a partner in part of the profits of the mill. He was not a partner in our general business. We made all purchases, made all sales. If there was any profits resulting from the mill business, he used to get a part of it.

Q. What was the business of Brandeis & Crawford?

A. Grain dealers.

Q. Where was the mill you refer to?

A. The mill was at Madison, Indiana.

Q. That is the mill that you referred to in which Shellcross had an interest?

A. He had an interest in a portion of the profits. He had no capital invested, no control at all.

Q. At what time did Shellcross make the arrangement with Forsyth & Brown?

A. My recollection is it was some time in June or July, 1865.

Q. When did the last transaction take place?

A. The last money? The date of that check will show the last money that we paid them; September, I think, my recollection is.

Q. September 30th, 1865, this check is?

A. That was the date on which we paid the ten thousand dollars ($10,000).

Q. Well, was that the last transaction?

138 A. It was the last purchase; a few days after that we sent them another order to buy us more wheat, and that transaction was that they had purchased the amount we had ordered, and drew on us for eight thousand dollars. That was on Saturday. On Saturday night we told Mr. Shellcross that he had better come up here and see whether that was all right. There was something about that transaction that looked a little suspicious, and he saw their bookkeeper on Sunday, and

learned that Mr. Brown had gone off to attend to some matters outside, and on Monday morning he went and demanded a receipt for the former purchase, the elevator receipt, and also for this last for which they had drawn for eight thousand dollars, and we refused to pay the eight thousand dollars which they drew on us for the last purchase. We have nothing later than that.

Q. In the arrangement of the business between Brandeis & Crawford, what did you do in person, or what was within the scope of your duties in the management of the business?

A. Well, it was giving such attention as the business required.

Q. Was there any division of duties between the members of the firm?

A. Not particularly so, except in this way, when we wanted to get up large quantities of grain in a very short time, I generally went out and attended to that, and Mr. Brandeis remained at home. I did, in
139 fact, most of the buying for the firm, and then I attended to making sales & attended to the finances, or anything that was required when I was at home.

Q. What of this business with Forsyth and Brown did you do personally?

A. I didn't do any of it.

Q. Who did transact that business?

A. Well, I wrote Forsyth and Brown several letters during the time that they were buying wheat for us. Mr. Brandeis wrote part of the letters and paid most of the drafts, if not all. I don't know whether he paid them all, but he paid most of them that were made on us, and the arrangement, as I stated before, was made by Shellcross here.

Q. What part of the business did Shellcross do?

A. He didn't do anything except he was here and saw several samples of wheat and posted them in regard to the kind of wheat we preferred for our mill.

Q. Where is Shellcross?

A. He is at Cannulton, Indiana.

Q. Was you ever in Chicago during the time Forsyth & Brown was doing this business?

A. Between July and October, 1865?

Q. Yes.

A. I don't recollect that I was.

Q. Do you know which if either member of the firm of Forsyth and Brown attended to this business?

A. Only from hearsay.

Q. Did you see the drafts you have referred to for ten thousand dollars?

140 A. My recollection is that I did see it. I was at home at the time the draft came. I was there a few days after when the one for eight thousand dollars came in, because my attention was called to it, and I held a consultation in regard to paying it. My recollection is that I saw the ten-thousand-dollar check.

Q. Now look at the check now shown you and which you have just produced and say what that paper is.

Q. That check was made to pay ten thousand dollars. It is in the handwriting of my partner.

Q. Do you recollect the making of the check?

A. I don't know that I saw it made. I don't know but I did. Our transactions were pretty large about that time, and it is very difficult

for me to say in regard to a single transaction myself. I recollect the transaction very well, and think I saw the draft.

Q. You knew then, that that transaction consisted of an order being sent by Brandeis & Crawford to Forsyth & Brown, to buy ten thousand dollars' worth of wheat, and that they drew upon you for ten thousand dollars?

A. It was an order for wheat, but I may not have the amount exactly; about ten thousand dollars, I should think it about that; whether it was or not we sent them orders for a certain amount, but he
141 made the purchases, and they drew on us for ten thousand dollars to cover the amount of the purchase, which was paid.

Q. And the amount or draft was paid by drawing this check?

A. Yes; upon the understanding that it was in this bank at the time.

Q. Did you receive any of the wheat?

A. On this purchase?

Q. Yes.

A. No, sir.

Q. How soon after the date of this check did Shellcross come to Chicago and see about the transaction?

A. Well, I should think it was within a week, a very few days at any rate. They wrote us that they were unable to get transportation just then, and that they would get it in a few days. We ordered them at the same time to ship the wheat right forward to Madison and they failed to do it, and they failed to ship, and the manner in which the other order was managed we became a little suspicious that everything was not right with them, and Mr. Shellcross came up here at once.

Q. Were all the other orders filled, and to your satisfaction except that one?

A. Yes; so far as I now recollect.

Q. The accounts are satisfactory excepting the transaction about the ten thousand dollars?

A. Yes.

142 Q. How long did Forsyth & Brown continue to do business after that ten thousand dollars was paid?

A. I don't know; a very short time though.

Q. You have spoken of the bankrupt proceedings. What bankrupt proceedings do you mean?

A. Riober & Forsyth's.

Q. In what court?

A. United States district court.

Q. In the northern district of Illinois?

A. I believe that is the name of this court.

Q. Here in Chicago?

A. In this city.

Q. When did you first hear that there had been such proceedings in bankruptcy?

A. I don't recollect exactly the time; I was in Chicago, and some one told me that Forsyth had gone into bankruptcy. I don't recollect exactly the date of it.

Q. Did you make any examination of the papers in court at that time?

A. I did not; no, sir.

Q. Was that before or after he had been discharged?

A. Well, I was just trying to think. It was either about the time or shortly after his discharge; my recollection is it was shortly after. A

man by the name of Forsyth told me about it; Henry Forsyth, who had formerly lived in Louisville. He was an uncle perhaps of Robert's.

Q. When did you make the examination of papers that you have referred to in your examination-in-chief?

A. I believe it was in the spring.

143 Q. Was there a debt schedule as due from Brandeis & Crawford?

A. There was a list of indebtedness to Brandeis & Crawford, of Pittsburgh, and some other parties of Pittsburgh; and parties living in other places. I don't recollect the name now.

Q. What was the amount put down to Brandeis and Crawford?

A. I believe it was just the amount of the judgment, or very near it.

Q. Was the words "Pittsburgh, Pennsylvania", written after the names Brandeis & Crawford, or were there characters indicating the same words written above?

A. I believe it was written Brandeis & Crawford, Pittsburgh, Pennsylvania, in full.

Q. There were other names designated in full?

A. Yes.

Q. Were they contiguous to the names of Brandeis & Crawford?

A. I believe they are.

Q. Do you recollect any of these names?

A. I do not. I took the list, I think, at the time; I have that list at home.

Q. Is it a true copy, as was contained in the schedule?

A. Yes, sir.

Q. Will you furnish the list and attach it to your deposition?

A. If I can find it, I will.

Q. You have spoken of a judgment and of a suit who were the plaintiffs in that suit?

A. Against Forsyth & Brown?

144 Q. Well, you have talked of a suit and judgment without giving any names to it?

A. The suit of Brandeis & Crawford against Forsyth & Brown.

Q. Who did you say the attorneys were of Brandeis & Crawford?

A. Kales & Williams.

Q. You mean the gentlemen who are now known as Kales & Williams in this city, practicing?

A. Yes, sir.

Q. Who employed them?

A. I don't recollect about whether Mr. employed them, or whether Mr. Shellcross, but one or the other.

Q. Who were the attorneys in that suit for Forsyth & Brown?

A. I only know that from hearsay.

Q. Who have you heard were the attorneys?

A. Well, Smith.

Q. Was it a contested suit?

A. Yes.

Q. Did you ever examine the papers or records in that case?

A. I never went to the court and examine them; I have seen copies of them only.

Q. Were they certified copies?

A. I don't know that they were; I don't know but they were.

Q. Where did you those copies?

A. I have seen some of them at Mr. Crawford's office, and I think I saw some at Kales & Williams' office.

Q. When?

145 A. Well, at Kales and Williams', some time along in 1866, and at Mr. Crawford's office, in 1871.

Q. Well, can you state from your recollection what those copies purported to be?

A. Well, one paper I saw was an examination of Forsyth's under a bill of discovery, which was filed by Kales & Williams, to try and discover some property out of which this debt of ours could be paid.

Q. You recol*lect* any other?

A. I don't recollect any other.

Q. Well, that paper was no part of the papers of record of the original suit of Brandeis and Crawford against Forsyth & Brown, was it?

A. Well, it was a continuation of the suit. Judgment was obtained, and then a bill of discovery was obtained.

Q. When did you ever see the declaration, or what purported to be a copy of the declaration, in the orginal suit?

A. I don't recollect.

Q. Did you ever see the judgment, or what purported to be a copy of the judgment, in that suit?

A. I don't recollect whether I have or not. I have seen a good many papers connected with the case in one or another, but don't recollect particularly anything except this examination under that bill of discovery.

Q. You have then no recollection of seeing an execution, have ?

A. Well, I may have seen it and may not.

Q. Did you ever have a certificate of purchase issued by the marshal?

146 A. Yes, sir.

Q. Where is that?

A. It was returned to the marshal at the time he made us a deed for that property.

Q. Where is the deed?

A. The deed is either in Louisville or in my satchel at my boarding-house. I carried it for some time, and I took some papers out of my satchel when I was at home, and I may have left it there. Mr. Crawford had it here. Whether I took it home with me I am not positive.

Q. You have spoken of a bill of discovery. That I suppose you mean was a bill of discovery to obtain property to satisfy the judgment?

A. It was a trial to discover whether Forsyth had property out of which we could make our judgment.

Q. Who commenced that suit?

A. The attorneys, Kales & Williams.

Q. Do you know represented the defendants?

A. I don't: except by hearsay, as I have said before.

Q. You gave the amount and date of the judgment obtained against Forsyth & Brown on a draft. Where did you get that amount and date from?

A. I got it from the papers. Come to refresh my recollection in regard to it, I got it from the bill that *that* is filed in this suit; and *and* previous to that time I had it from some other source, a matter that I could not carry in my mind wholly. I think I got it in the first

147 place from a copy of the judgment, or papers that I have seen in the United States court in the original suit.

Q. You don't recollect the source of information?

A. No.

Q. You have also stated that property was levied upon and sold under

an execution issued upon a judgment against Forsyth & Brown; where did you get that information from?

A. That the property belonged to——

Q. No; the fact that it was levied on and sold.

A. Well, I ordered the execution issued myself.

Q. Give the order to the clerk?

A. No; I think our attorney gave him the order to release it.

Q. Who did you give the order to?

A. I gave it to Mr. Crawford to have it done.

Q. Well, what else in person did you do about it?

A. That was all. My partner came up here and attended the sale and made the purchase.

Q. You were not present at the sale?

A. No.

Q. Well, how did you get information as to what was done at the sale?

A. I got it from my partner, and then I got it from the clerk's certificate—clerk of the United States court's certificate—the marshal's certificate issued by the clerk.

Q. Do you know what the date of that sale was?

A. I believe it was in June, 1871. I have a memorandum June 7, 1870.

Q. You have referred in your examination-in-chief to some proceedings in a bankrupt matter. What proceeding was that?

148 A. I don't know that I referred to a proceeding in bankruptcy, I examined the papers. I said, in my examination-in-chief, that I went with Mr. Crawford and examined the papers filed in the Forsyth bankrupt case.

Q. Well, didn't you have some proceedings or cause some to be instituted on that bankrupt proceedings?

A. That was a proceeding instituted to set aside his discharge in bankruptcy.

Q. Well, didn't you cause that to be done?

A. I don't recollect the name of the parties who started that—that is, in whose name it was brought. It was not in the name of Brandeis & Crawford, at least I was so informed; I was not present.

Q. Well, who did attend to the proceedings?

A. Mr. Crawford was the attorney.

Q. Was he acting for you in the matter?

A. Not directly.

Q. Well, did you authorize the proceedings to be taken or set aside the discharge, or participate in the movement in any way?

A. We felt an interest in having the proceedings commenced, but I don't recollect whether we started it ourselves or not.

Q. Do you know whether evidence was ever taken in the proceeding or not?

A. I believe there was some evidence.

Q. Was you examined yourself?

A. Was I examined?

Q. Yes.

A. I don't recollect of ever having been.

149 Q. Is that the proceeding in which you speak of having seen an examination of Forsyth, or copy of an examination of Forsyth?

A. No; I saw it in Mr. Crawford's office, took it over to Mr. Hill's office and read it over.

Q. Well, was that examination—did it profess to be taken in the bankrupt proceedings?

A. I don't know that I understood your question?

A. There was an examination, as I understand it, to set aside the discharge in bankruptcy, and you have talked about seeing an examination of Forsyth's, taken in some proceedings; was it in that?

A. No; that was in this bill of discovery.

WM. W. CRAWFORD.

I, G. S. Barber, of the county of Cook, and State of Illinois, duly appointed to take the deposition of said W. W. Crawford, a witness, whose name is subscribed in the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said witness in said suit, he was duly sworn by me to testify the truth; that the said deposition was taken at the office of Henry Crawford, in the city of Chicago, county & State aforesaid, on the 4th day of March, A. D. 1873, & that after said deposition was taken by me as aforesaid, it was read over by said witness, and that thereupon, the same was signed & sworn to by the said deponent, before me as such notary public at
150 the place aforesaid, and on the 24th day of March, A. D. 1873.

[SEAL.] G. L. BARBER,
Notary Public.

Notary's fees paid by W. Crawford.

G. L. BARBER.

(Endorsed:) Filed May 26, 1873. Wm. H. Bradley, cl'k.

151 The deposition of George S. McKiernan, opened June 10th, 1873; which is in the words and figures following, to wit:

152 Circuit court of the United States, northern district of Illinois.

ADOLPH BRANDEIS & WILLIAM W. CRAWford
vs.
JAMES D. WALLACE & ROBERT FORSYTH.

To the defendants, or Messrs. Goudy & Chandler, their solicitors:

The defendants are hereby notified that at 10 o'clock a. m., on Thursday, May 22d, at the auditor's office of the Jeffersonville, Madison & Indianapolis Railroad, on the corner of Main and Third streets, in the city of Louisville, Kentucky, the complainant will proceed to take the depositions of Geo. S. McKiernan and William L. Shaleross, to be read as evidence on the trial of the above-entitled cause, and such taking will be continued from day to day, at the same place and between the same hours, until completed.

May 19, 1873.

HENRY CRAWFORD,
Solicitor for Compl't.

Copy of this notice delivered to us May 19th, 1873.

GOUDY & CHANDLER,
Sol's for Def'ts.

153 UNITED STATES OF AMERICA.
District of Kentucky, City of Louisville, ss:

Be it remembered that on this twenty-second day of May, in the year of our Lord one thousand eight hundred and seventy-three, I, James A. Beattie, a commissioner, duly appointed by the circuit court of the United States for the district of Kentucky, and commissioned as such, with power and authority to take acknowledgements of bail, affidavits, and the depositions of witnesses in civil cases, and to exercise the other powers conferred on such commissioners by the acts of Congress, did call and cause to be and personally appear before me at the auditor's office of the Jeffersonville, Madison and Indiana Railroad, on the corner of Main and Third streets, in the city of Louisville and State aforesaid, pursuant to the annexed notice, George S. McKiernan, to testify and the truth to say, on the part and behalf of the complainants, in a certain suit or matter of controversy, now depending and undetermined in the circuit court of the United States for the northern district of Illinois, wherein Adolph Brandeis and William W. Crawford are complainants, and James D. Wallace and Robert Forsythe are respondents.

154 And the said GEORGE S. MCKIERNAN, being about the age of fifty-five years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of the controversy aforesaid, I did carefully examine the said George S. McKiernan, and he did thereupon depose, testify, and say, as follows, viz:

Examined by HENRY CRAWFORD, Esquire, counsel for complainants:

Question 1. State your name, age, residence, & occupation.

Answer. My name is George S. McKiernan; my age is fifty-five years; I reside in New Albany, Indiana; I am the auditor of the Jeffersonville, Madison and Indianapolis Railroad at Louisville Kentucky.

THURSDAY, *May 22nd*, 1873—5½ o'clock p. m.

Adjourned the taking of this deposition until Friday, May 23rd, at 10 o'clock a. m., at which time met pursuant to adjournment, and resumed the taking of the same.

JAMES A. BEATTIE,
Commissioner.

155 Question 2. Do you know the complainants Adolphus Brandeis, and William W. Crawford? If yea, state how long you have known them; in what business they were engaged in the year 1865, and at what place they were so engaged.

Answer. I know both of said complainants, and have known them for seventeen years last past, as grain merchants doing business in Louisville, Kentucky. In 1865 and 1866, I know that they were concerned in a flour mill at Madison, Indiana, the supplies of wheat for which were purchased by said Brandeis & Crawford, sometimes in their own name, and sometimes in the name of W. W. Crawford & Co., which was the style of the mill firm at Madison.

Question 3. Were you in their employment in any capacity in the years 1865 and 1866? If so, please state in what capacity.

Answer. In the latter part of 1865, and early part of 1866, I was in their employ as principal bookkeeper.

Question 4. During the time you were so employed, did the com-

plainants have any business transactions with Robert Forsythe and George T. Brown of Chicago, Illinois, composing the firm of Forsythe & Brown? If so, state such transactions fully.

156 Answer. At the time I entered the service of Brandeis & Crawford there was an account on their books against the said Forsythe & Brown, showing a debit balance of ten thousand dollars, more or less. I don't remember the exact amount. Just about that period Forsythe & Brown drew upon Brandeis & Crawford for eight thousand dollars, which draft Brandeis & Crawford declined to pay, for the reason that said Forsythe & Brown had not furnished wheat to cover the sums previously advanced to them by Brandeis & Crawford. By direction of Brandeis & Crawford, I went to Chicago, Illinois, about the latter part of October or early part of November, 1865, I can't fix the exact, date to investigate the cause of Forsythe A Brown's failure, to make shipments of wheat to cover the sums advanced to them by complainants. After reaching Chicago, I found that the house of Forsythe & Brown had failed and quit business. My present impression is that I did not succeed in getting any information during that trip concerning the causes of the failure of said firm of Forsythe & Brown. I accordingly returned to Louisville, and in a few days made another trip to Chicago. I then had an interview with the respondent,

157 Robert Forsythe, one of the partners in said firm of Forsythe & Brown. We had a long conversation together concerning the failure of his house, together with other matters, as Forsythe and myself had been acquaintances from early boyhood, and I naturally felt a sympathy for him in his misfortune. He knew that I was in the service of Brandeis & Crawford, and introduced the subject himself, without any prompting on my part, of the indebtedness of his house to Brandeis & Crawford. He commenced by saying that I might tell Brandeis & Crawford not to be uneasy about the debt owing to them by Forsythe & Brown, because it should be paid to the last cent. I regarded the decided manner in which he expressed himself as favorable to the interests of Brandeis & Crawford, and for this reason the exact language he employed made such an impression upon my mind that I think I have repeated it almost to a word. At the time this conversation occurred the accounts of Forsythe & Brown with Brandeis & Crawford were, I think, not in a definite shape, by reason of said firm of Forsythe & Brown not having rendered an invoice or two of wheat purchases. The amount, however, was approximately

158 known to be in the neighborhood of ten thousand dollars due from Forsythe & Brown to Brandeis & Crawford. In my conversation with Forsythe, this approximate amount of ten thousand dollars was spoken of between us, and Forsythe seemed to be aware of the fact, that the balance resulted from a failure on the part of Forsythe & Brown to use the money in their hands belonging to Brandeis & Crawford for the purpose for which said funds were intended, that is to say, the purchase and shipment of wheat. Forsythe seemed to be perfectly conscious that his firm had not acted fairly or squarely in this matter with Brandeis & Crawford, and he deplored ever having had any business connection with such a man as he had found Brown to be. When Forsythe spoke of paying every cent of the debt to Brandeis & Crawford, he mentioned his own private fortune and means. He said that he worth two hundred thousand dollars.

Question 5. State whether, to your knowledge, that debt or any part of it has ever been paid?

Answer. No part of said debt has ever been paid to the best of my knowledge.

GEORGE S. McKIERNAN.

159 UNITED STATES OF AMERICA,
District of Kentucky, City of Louisville, ss:

Be it remembered that, on this twenty-third day of May, in the year of our Lord one thousand eight hundred and seventy-three, I, James A. Beattie, a commissioner duly appointed by the circuit court of the United States for the district of Kentucky, and commissioned as such, with power and authority to take acknowledgments of bail, affidavits, and the depositions of witnesses in civil cases, and to exercise the other powers conferred on such commissioners by the acts of Congress, do hereby certify that the reason for taking the foregoing deposition is that the same was taken in a cause pending equity in the circuit court of the United States aforesaid.

I further certify that a notification of the time and place of taking the said deposition signed by counsel for complainant was made out and served on the counsel for respondents to be present at the taking of the deposition, and to put interrogatories, if he or they might think fit, which notice is hereto annexed.

I further certify that on the 22nd and 23rd days of May, A. D.
160 1873, I was attended by counsel for the complainants and by the witness who was of sound mind and lawful age, and the witness was by me carefully examined and cautioned and sworn to testify the whole truth, and the deposition was by me reduced to writing in the presence of the witness, and from his statements, and after carefully reading the same to the witness he subscribed the same in my presence.

I have retained the said deposition in my possession for the purpose of mailing the same with my own hand to the court for which the same was taken.

I further certify that I am not of counsel or attorney for either of the parties in said deposition and caption named, or in any way interested in the event of the said cause named in the caption. In testimony whereof I have hereunto set my hand & seal this twenty-third day of May, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[SEAL.] JAMES A. BEATTIE,
U. S. Commissioner Circuit Court U. S. for the District of Kentucky.

(Endorsed:) Opened June 10, 1873, for Mr. Chandler, def'ts sol'r. Wm. H. Bradley, cl'k.

161 And the defendants to said original bill, to sustain the issues on their part, offered and read in evidence the deposition of Robert Forsythe, opened October 28th, 1874, with the letters referred to therein in cross-interrogatories eight to sixteen inclusive, which letters purport to be signed by Forsythe & Brown, and to be addressed to Brandies and Crawford, which letters bear date July 31st, 1865, August 4th, 1865, August 8th, 1865, August 10th, 1865, and September 5th, 1865, respectively. Which said deposition and letters are in the words and figures following, to wit:

162 STATE OF ILLINOIS, }
Cook County, ss:

The deposition of Robert Forsythe, of the county of Cook and State of Illinois, a witness of lawful age, produced and sworn and examined upon corporal oath, on the nineteenth day of July, A. D. 1873, before Robert J. Fisher, jr., a notary public in and for said county and State aforesaid, at the office of Goudy and Chandler, in the city of Chicago, in the county and State aforesaid, by consent of the solicitors for the complainants and defendants, to be used in a certain suit in chancery and matter in controversy now pending and undetermined in the circuit court of the United States, in and for the northern district of Illinois, in which Adolphus Brandies and William W. Crawford are complainants, and Robert Forsythe and James D. Wallace are defendants on behalf of the said defendants.

The said ROBERT FORSYTHE, being first duly sworn by me, as a witness in the said cause, previous to the commencement of his examination to testify the truth in relation to the matters in controversy so far as he should be interrogated, testified as follows:

163 Direct-examination by Mr. CHANDLER:

1. Q. State your name, age, residence, and occupation?

A. My name, Robert Forsythe; I am forty-seven years of age; I reside in Chicago, and have no occupation at present.

2. Q. You are one of the defendants in this suit?

A. Yes, sir.

3. Q. Are you acquainted with the complainants, Adolphus Brandies and William W. Crawford?

A. I have seen them. I have no personal acquaintance with them.

4. Q. Were you ever in partnership with a man by the name of George H. Brown, and if so, when, where, and in what business?

A. I was in the spring of 1865 in the commission business in Chicago. The name of the firm was Forsythe and Brown.

5. Q. How long did you continue in partnership with him?

A. About sixty days.

6. Q. During the time you were in partnership with said Brown, did you or the said firm have any business transactions with these complainants?

A. Not to my knowledge.

7. Q. Did the said firm, while you were connected with it, purchase for the complainants any wheat?

A. Not to my knowledge.

8. Q. Have you read the bill of complaint in this case?

A. I have not.

164 9. Q. State, then, what you know, if anything, in regard to a purchase by said Brown, or Forsythe & Brown, of wheat for the complainant some time during the year 1865?

A. I know nothing whatever of it, except when the suit was brought against me as one of the partners.

10. Q. Did you ever know anything of the receipt of any money from the complainants for such purchase?

A. I never did.

11. Q. When did you first hear of any such pretended transaction?

A. I cannot give the date, sir. It was sometime when a clerk of Brandies & Crawford called on me, and told me that such a purchase had been made for that firm. I told him I knew *him I knew* nothing of it.

12. Q. Do you know about when that was?

A. I think it was either the fall of 1865 or the spring of 1866; I am not certain which. I couldn't recollect the date now; I was at the railroad office then.

13. Q. You may state what you know about any suit being commenced against you and Brown based upon any such transaction?

A. I knew a suit was instituted against me, and I put it into the hands of C. C. Bonney to defend, and I did not think there was any claim in law or equity against me. He attended to it, and I understood there was a judgment got against me.

14. Q. Are you acquainted with the property or the real estate described in the bill of complaint, being lots 4, 5, and 6 of E. L. Sher-
165 man's subdivision of lots 4, 5, and 6 in block 1, Clarke's addition to Chicago.

A. I am.

15. Q. You may state whether or not you ever purchased that property; and, if so, when and by whose means.

A. I purchased it, sir, by my own means in 1860 or 1861, I believe. I am not certain which.

16. Q. Of whom?

A. Of Ezra L. Sherman. Loomis, I believe, was the trustee of the property.

17. Q. What consideration did you pay for it?

A. I think it was fifty-five dollars a foot, sir.

18. Q. What was your pecuniary condition at that time?

A. I didn't owe a dollar in the world, sir. I had means.

19. Q. Can you state about what you were worth over and above all your liabilities at that time?

A. No; not exactly. I presume I was worth about $20,000.

20. Q. Were you or not at that time in any way indebted to the complainants?

A. I was not, sir.

21. Q. To whom was the title purchased by you conveyed?

A. William R. Arthur, trustee for my wife and children, if I had any.

22. Q. That is the deed of trust set up in the bill?

A. Yes, sir.

23. Q. Did you ever take possession of the property?

A. I did.

24. Q. You can state what you did about the property.

A. I built a house and a barn on it and lived there.

25. Q. How long did you continue in possession?

166 A. Until 1869 or 1870. I am not certain which.

26. Q. When was your possession first interfered with, and by whom?

A. By these complainants.

27. Q. About when, and in what manner?

A. They took possession of the property just before the fire. It was done by breaking into the house, I presume. I had it all locked and closed up.

28. Q. How did you have it closed?

A. I had it locked, sir, and the windows were all fastened down.

29. Q. How long prior to that time had you had a tenant actually residing in it?

A. I think the tenant left it the first of May of that year—the year of the fire.

30. Q. You may state what you know in regard to a conveyance by Arthur of this property to Nathan Corwith, for what purpose the conveyance was made, and what was the consideration.

A. It was conveyed to him to secure him for money that I owed him.

31. Q. At whose request was the conveyance made?

A. At the request of myself and wife.

32. Q. What arrangement, if any, was made in regard to the conveyance or any reconveyance?

A. There was no arrangement made for reconveyance.

33. Q. What was the understanding or agreement then in regard to this deed being held as security?

A. If I got able to redeem it I was to purchase it back from him.

34. Q. Do you mean to purchase it back for yourself?

167 A. I could not tell whether I would purchase it back for myself or for whom.

35. Q. Was there any agreement then that the property should be reconveyed to you upon the payment of this money?

A. There was not, sir.

36. Q. Look at the abstract now shown you of a deed from William R. Arthur to Nathan Corwith, and state whether it is a correct abstract of that deed according to the best of your knowledge.

A. I believe it is, sir; and I herewith attach a copy thereof, which is marked Exhibit A.

(Counsel consent that this copy may be used in the place of the original, which was destroyed by fire.)

37. Q. Examine the abstract shown you of the deed from Nathan Corwith and wife to Robert Forsythe, and state what you know of the circumstances of the execution of such a deed, and whether that abstract is a correct abstract thereof.

A. This abstract shown me I believe to be correct. The deed was given me for the purpose of raising money for the purpose of paying him for this said property, to enable me to raise money, and I herewith attach a copy of the abstract, which is marked Exhibit B.

(Counsel consent that the copy shall be used instead of the original.)

168 38. Q. You may state whether you had prior to that time negotiated a loan of any money; and, if so, from whom?

A. I had, with Wright and Tyrrell, as agents for John Cochran in New York. I had been in negotiation with them some weeks, and provided I could get the deed and give them the security they would advance me money.

39. Q. How much money did you negotiate for?

A. Fifteen thousand dollars.

40. Q. You may state whether you finally effected the loan.

A. I did. I effected the loan with the parties named.

41. Q. How was it secured?

A. It was secured by a trust-deed on the property named, lots 4, 5, and 6.

42. Q. Examine the trust-deed shown you, marked Exhibit C, and state whether or not that is the original trust-deed executed by you at that time.

A. That is, sir.

43. Q. Did you receive the money, the fifteen thousand dollars?

A. I did; less the interest and the expenses.

44. Q. Did you execute notes, as described in that deed?

A. I did, sir.

45. Q. I see that trust-deed is dated on the tenth day of March, 1870, but not acknowledged until the fifteenth. You may state, if you know, how that happens.

A. I can account for it by the delay of Mr. Corwith. I had been negotiating for some time, and they would not give me the money
169 until I got the deed, and I believe Mr. Corwith's wife was absent, or something of that kind.

46. Q. Did you take the deed from Corwith to you and deliver it to Wright before receiving the money?

A. I am not positive about that, sir; but I think not. I think I delivered the deed when I got the money.

47. Q. I mean at the same time?

A. Yes, sir.

48. Q. What did you do with the money?

A. I paid a portion of it to Mr. Corwith and I used a portion of it for my own private expenses.

49. Q. You may state whether you paid to Mr. Corwith out of that money all that was due to him secured by the property.

A. No, sir; I believe I left the balance in his hands.

50. Q. You may state what representations, if any, you made to Mr. Wright as to what you were going to do with this money.

A. I told him I wanted to redeem this property, and I wanted some money myself; I believe that is all I told him.

51. Q. You may state whether or not your former wife, Mrs. Forsythe, is still alive.

A. She is not, sir.

52. Q. When did she die?

A. She died in the fall or winter of 1869.

53. Q. Do you remember what month?

A. November.

54. Q. You may state whether you have since married.

A. I have.

55. Q. Are you now a married man?

170 A. I am.

56. Q. Have you any child or children, born in wedlock?

A. Yes, sir.

57. Q. How many?

A. I have got one son.

58. Q. How old?

A. He is a year and better.

59. Q. He is still alive?

A. Yes, sir.

60. Q. Do you know anything about the sale of this land under this trust-deed to Scoville?

A. Not to my own knowledge; only by rumor.

61. Q. Did you furnish any of the money to purchase it?

A. I did not, sir.

62. Q. Have you any interest further in the property?

A. I have not, sir.

63. You may state now whether you have ever filed a petition in bankruptcy in the United States court.

(Objected to.)

A. I have.

64. Q. When did you file the petition?

A. I think in 1866, sir; my memory is not good about dates.

65. Q. You may state whether or not you were discharged as a bankrupt by the United States district court.

A. I was, sir.

66. Q. When?

A. I think in the year 1866.

67. Q. You may state what became of your discharge.

171 A. To the best of my knowledge and belief, it was destroyed in the fire.

68. Q. What fire?

A. The big fire: the Chicago fire of October, 1871.

69. Q. You havn't it, then, in your possession now?

A. I have not, sir.

70. Q. Do you know what has become of the petition and other papers in the cause of bankruptcy in which you filed a petition?

A. I do not, sir.

(It is admitted that the papers in the bankrupt case referred to were destroyed in the fire of October, 1871.)

Cross-examination by Mr. CRAWFORD:

C.-ex. 1. Q. Mr. Forsythe, what date do you fix for the dissolution of the partnership between yourself and Mr. Brown.

A. I can't exactly give the date. I recollect it was about sixty days after we first joined partnership.

C.-ex. 2. Q. When was that: in what month?

A. I left him in April, 1865, I think. I am not positive about the date.

C.-ex. 3. Q. You left him?

A. I dissolved partnership. It was just after we commenced business.

C.-ex. 4. Q. Did you publish any notice of the dissolution of the firm?

A. I did, sir.

C.-ex. 5. Q. In what paper?

172 A. I published it in the Tribune, the Times, and, I think, the Evening Journal. I published it in three papers.

C.-ex. 6. Q. And you think that was as early as April, 1865?

A. Yes, sir: it was before I left the Illinois Central Railroad. I left there in June, and I know I published it before I left there some time.

C.-ex. 7. Q. Have you any recollection of any business transactions with him as late as August, 1865?

A. No, sir.

C.-ex. 8. Q. (Handing witness a paper.) Please examine that paper handed you, and state in whose handwriting the body of it and the signature are?

A. I am not familiar with it, sir.

C.-ex. 9. Q. Is it not Mr. Brown's?

A. I couldn't say.

C.-ex. 10. Q. What is your best impression?

A. I believe it is, sir.

C.-ex. 11. Q. (Handing witness a paper.) Please examine that paper, and also state whose handwriting it is, if you know?

A. I should think this is his handwriting, sir. I am not very familiar with it. It is a long time since I saw it.

C.-ex. 12. Q. And also this dated August fourth, 1865?

A. I would say this is Brown's signature.

C.-ex. 13. Q. And that dated August 8th, 1865?

A. Yes, sir.

C.-ex. 14. Q. And that dated July 31st, 1865?

A. They all appear to be similar, sir.

C.-ex. 15. Q. And that dated August tenth, 1865?

A. Yes, sir.

173 C.-ex. 16. Q. Is that one dated September fifth, 1865, signed "Forsythe and Brown," in his handwriting?

A. I believe it is, sir. I believe all these are.

(Counsel for the plaintiff offers in evidence the papers to which the witness has just testified.)

C.-ex. 17. Q. Do you recollect having an interview with Mr. McKiernan, in the fall of 1865, with reference to the claim of Brandies and Crawford against the firm of Forsythe & Brown?

A. I do.

C.-ex. 18. Q. Did he present then an account against the firm, or a pretended claim, amounting to upwards of nine thousand dollars?

A. He did not.

C.-ex. 19. Q. What did he do?

A. He told me there was a claim.

C.-ex. 20. Q. That is what I mean.

A. Yes, sir; he told me there was a claim.

C.-ex. 21. Q. Did you not at that time say to him, in substance, that Brandies and Crawford need have no uneasiness, that they should be paid every dollar?

A. Never, sir; I never said that.

C.-ex. 22. Q. Do you remember the conversation distinctly?

A. I do very distinctly, because he sympathized with me; but I never said anything of that kind.

C.-ex. 23. Q. Do you remember what the complaint against you and Brown was in the United States court brought by Brandies and

174 Crawford; what was it for?

A. No, sir; I couldn't tell that.

C.-ex. 24. Q. Was not the claim against Forsythe and Brown for monies which Mr. Brown had kept in his hands, being the proceeds of sale of certain wheat?

A. I never was told that until afterwards.

C.-ex. 25. Q. By whom were you told it?

A. By Mr. Bonney. I did not know it was for money at all at first; then Mr. McKernan didn't tell me that.

C.-ex. 26. Q. What did Mr. McKernan say it was for?

A. He came to me to find out how he could get at Brown. He didn't say much and he didn't stay long with me. I was very much engaged at the time.

C.-ex. 27. Q. In what business were you engaged after you left the Illinois Central Railroad?

A. I didn't do much of anything except trading around.

C.-ex. 28. Q. Were you engaged on the Board of Trade?

A. No, sir; not after that, not for some time.

C.-ex. 29. Q. You were advised by Mr. Bonney, who was your attorney, that judgment had been recovered against you on this demand, were you not?

A. Yes, sir.

C.-ex. 30. Q. And you were advised also by Mr. Bonney that it was for wheat that had been bought in the name of Forsythe and Brown for Brandeis and Crawford, if any?

A. Yes, sir.

C.-ex. 31. Q. And that Mr. Brown had sold the wheat and
175 pocketed the proceeds, wasn't that it?

A. No, sir; he didn't give me particulars: I couldn't tell that.

C.-ex. 32. Q. Do you know whether Mr. Bonney defended for you upon the ground that you were not a member of that firm?

A. I believe he did.

C.-ex. 33. Q. That defense was unsuccessful, was it not?

A. I believe so.

C.-ex. 34. Q. Do you remember the date of the judgment against you?

A. No, sir.

C.-ex. 35. Q. Was it not in March, 1866?

A. I believe it was, sir.

C.-ex. 36. Q. For ninety-six hundred and odd dollars?

A. I believe that is the amount, sir.

C.-ex. 37. Q Do you remember a proceeding that is commonly called a creditors' bill that was brought against you in the year 1866, later, in which you had a lengthy examination before Bishop, master?

A. Yes, sir.

C.-ex. 38. Q. That was brought by Brandies and Crawford, was it not?

A. Yes, sir; I believe it was.

C.-ex. 39. Q. Prior to the bringing of that, had they not had an execution issued and returned against you unsatisfied?

A. I believe they had, sir.

C.-ex. 40. Q. Where were you residing at that time, in this property in controversy?

A. At what time, sir?

C.-ex. 41. Q. In 1866.

A. I was.

176 C.-ex. 42. Q. Inside that enclosure, where that house was, is other land included?

A. Yes, sir.

C.-ex. 43. Q. How many feet?

A. Fifty.

C.-ex. 44. Q. When did you personally cease the occupancy of the house?

A. I think in the spring of 1870.

C.-ex. 45. Q. Soon after your wife's death?

A. Yes, sir.

C.-ex. 46. Q. After your tenant left, about May first, 1871, did that house remain vacant and unoccupied down until the time the complainants took possession?

A. It did.

C.-ex. 47. Q. How many times were you in it during the time?

A. I couldn't tell; about fifteen or sixteen times.

C.-ex. 48. Q. You were not present when they took possession?

A. No, sir.

C.-ex. 49. Q. You have no means of knowing, of your own personal knowledge, how they obtained possession?

A. I have not, sir.

C.-ex. 50. Q. Do you remember the time when you filed the petition to obtain the benefit of the bankrupt law?

A. I can't recollect dates, Mr. Crawford. I think it was either in the spring of 1865 or the spring of 1866; I think it was in the spring of 1866. I am at bad hand at dates. I could only recall them by some other circumstance.

181 that you required this money to effect the redemption of that property?

A. They were aware of it, sir.

C.-ex. 91. Q. Were Messrs. Wright and Tyrrell the agents for Cochran, who made this loan?

A. I so understood it, sir.

C.-ex. 92. Q. Were not the complainants in possession of that property in the month of April, 1872?

A. I believe they were, or their agents: the same thing.

C.-ex. 93. Q. They had been in possession continuously from about the date of the fire?

A. Yes, sir.

Redirect examination by Mr. CHANDLER:

R.-d. ex. 1. Q. State what you know, if anything, about the recovery of the possession by Wallace from them?

A. They took out a distress warrant against the party occupying it?

R.-d. ex. 2. Q. A distress warrant?

A. An action of forcible entry and detainer. They went down there with a constable and took possession and put them out.

R.-d. ex. 3. Q. When you took possession, what did you do with the possession?

A. I handed it over to Mr. Wallace, and transferred the notes to him.

R.-d. ex. 4. Q. I will ask you if you had any connection with Brown at the several dates of these papers introduced?

A. Not to my knowledge.

R.-d. ex. 5. Q. What has been your business?

A. Railroad business, sir; general freight agent on a railroad.

182 R. D. *x.* 6. Q. What are you doing now?

A. I am not doing anything now.

R. D. *x.* 7. Q. You have stated that you think an execution was issued against you on that judgment prior to the filing of the creditors' bill; are you positive about that?

A. No, sir; I am not positive.

Recross-examination by Mr. CRAWFORD:

Re-X. 1. C. Q. (Handing witness paper.) Please examine that paper, and state whether you ever saw it before or knew of its existence?

A. I did not write that one, sir.

Re-X. 2. C. Q. Did you have any title to this property, or claim to have any interest therein, on the tenth of May, 1872?

A. I claimed that I acted as agent for other parties.

ROBT. FORSYTH.

183 STATE OF ILLINOIS,
County of Cook, ss:

I, Robert J. Fisher, jr., a notary public in and for said county and State aforesaid, do hereby certify that the above deposition of Robert Forsythe, a witness whose name is subscribed thereto, was taken before me, by consent of the solicitors for complainants & defend', at the office of Messrs. Goudy & Chandler, in the city of Chicago, in said county and State, on the nineteenth day of July, A. D. 1873; that Henry Crawford, esq., appeared for the complainants, and George Chandler, esq., for the defendants, and respectively examined and cross-examined said witness; that the said witness was first duly sworn to testify the truth,

the whole truth, and nothing but the truth, so far as he should be interrogated, and that the said deposition was read over to the said witness, and that thereupon the same was signed and sworn to by the said deponent.

Given under my hand and notarial seal this twenty-fifth day of July, A. D. 1873.

[NOTARIAL SEAL.] ROBERT J. FISHER, JR.,
Notary Public.

Notary fees, $11.10; paid by def'ts' sol'rs.

184 EXHIBIT A.

William P. Arthur to Nathan Corwith. ($15.00 stamp.) Instrument, trust-deed. Date of inst., Jan'y 4, '70. Consideration, $1.00. Date of filing, March 15, '70. Vol. and page, 553, 274. Lot 4, 5, 6 of E. L. Sherman's subdivision of lots 4, 5, & 6, block 1 of Clarke's addition to the city of Chicago, said addition being a part of the SW. fractional ¼ of section 22, town. 39, 14 east, in Cook County, Illinois, recites that on or about March 30, 1861, by deed of that date, Horatio G. Loomis conveyed to 1st party above-described premises in trust for certain purposes in said deed mentioned, which deed is recorded in book 210 of deeds, page 365.

That it was provided, in substance, in said deed, among other things, that upon the order or request in writing of Robert Forsythe and Mary E. Forsythe, his wife, jointly, first party should convey said premises to such person or persons as they might designate. That on November 3d, 1869, said Forsythe and wife served upon 1st party the following notice in writing: (Here follows notice, which, after making above recitals, sets forth, in substance, as follows): That a mistake or omission occurred in the drawing of said deed (above mentioned), by reason of

which the authority of said Forsythe and wife to compel 1st party
185 to execute such deed and certain of said trusts are doubtful.

That said Forsythe and wife, together with H. G. Loomis, at the November term of the superior court of Chicago, A. D. 1869, commenced a suit in chancery against said 1st party, and Leonard E. Forsythe, Robert Forsythe, Isaac Forsythe, Lydia T. Warrack, James Warrack, Phillip A. Warrack, Mary E. Warrack, & Helen M. Warrack, for the purpose of correcting and reforming said deed so as to accord with the intention and direction of said Forsythe and wife, as stated in said bill.

Requests said first party, as soon as said court shall decree that said be reformed as prayed, to make a good and sufficient conveyance of said premises in fee simple, absolute, to Nathan Corwith, in pursuance of the terms and provisions of such reformed deed. The deed so sought to be reformed being recorded in book 210 of deeds, page 365.

Dated Nov. 3, 1869.

(Signed) M. E. FORSYTHE. [SEAL.]
ROBT. FORSYTHE. [SEAL.]

Further recites that the decree mentioned in said notice has been rendered, and a deed executed by Benjamin D. Magruder, master in chancery of said county, in pursuance thereof, and reformatory of said 1st mentioned deed, bearing date November 6, 1869 and not yet recorded.

Therefore said Arthur, in pursuance of the deed from said Loo-
186 mis to him, dated March 30, 1861, and of the master's deed before referred to, and of the decree of court referred to in said master's deed, and of the request in writing above shown from said For-

sythe and wife, and in consideration of $1,00, does remise, release, sell, convey, and quitclaim to 2d party all the right, title, and interest, which he, 1st party, has in and to premises 1st above described. Covenants against acts of grantor.

EXHIBIT B.

Nathan Corwith and Mary E., his wife, to Robert Forsythe. ($15.00 stamp.) Instrument, deed. Date of inst., M'ch 12, '70. Consideration, $15,00. Date of filing, March 15, '70. Vol. and page, 586, 25. Remise, release, sell, convey, and quitclaim all right, title, and interest in and to lots 4, 5, 6 of E. L. Sherman's subdivision of lots 4, 5, 6 in block 1 of Clarke's addition to the city of Chicago: said addition being a part of SW f'r'l ¼ of sec. 22, T. 39 N., R. 14 E., in the city of Chicago, Cook Co., Ills. Homestead waived.

1-7 ROBERT FORSYTH. GEORGE T. BROWN.

OFFICE OF FORSYTH & BROWN,
COMMISSION MERCHANTS,
Chicago, July 31st, 1865.

Messrs. BRANDIES & CRAWFORD,
Louiscille, Ky.:

GENTLEMEN: Your valued favor of the 29th inst. came to hand today, and while reading it your despatch was brought in (quick delivery that for a telegram). We have bought to-day as follows: About 5,000 bushels No. one red; paid for 2,000 (more or less) 1.70; for eight cars 1.72, & one car 1.72. We happened to find about 3,700 bushels extra red winter, which we bought at 1.75. The millers here make from five to eight cents per bushel difference between No. one and extra, and it is very seldom you can get hold of the extra in this market. We shall continue to buy until ordered to stop. This will, most of it, have to go via C. & G't Eastern, as it is purchased in houses that their track connects with. The grain is going forward, some of it, & probably the whole lot will go to-morrow. We have made draft on you, payable to L. J. Gage, esq., cr. on a/c. for twelve thousand dollars: the exchange, which is ¼ %, is added, and the draft made payable, with exchange, on New York. We could make it payable in exchange, but it has got to come out either at that end or this, and it is the same thing. We enclose market report & hope to hear from you often.

Truly, &c.,

FORSYTH & BROWN.

1-8 ROBERT FORSYTH. GEORGE T. BROWN.

OFFICE OF FORSYTH & BROWN,
COMMISSION MERCHANTS,
Chicago, Aug. 4th, 1865.

Mess. BRANDIES & CRAWFORD,
Louiscille, Ky.:

GENTLEMEN: We are in receipt of your valued favor of the 2nd inst., and contents have attention. We note your remarks in regard to making drafts or remitting. We had, before receiving your letter, made draft on a/c of purchases for $2,500,00, and have made arrangements here so that it will be cheaper to draw than any other way, as, for instance, your exchange costs you three ¼ % premium there, and we would be obliged to make a discount of ¼ to ¾ here in order to sell it.

Now we draw payable in par funds there, and it costs you nothing either here or there. We understand your letter to mean, in regard to price here, when you say not to go beyond 15 to 16 c. per bush. at the current rate, that you mean New York prices. Are we correct? For instance, if it is worth 1.80 in New York, we should not pay over $1.65 here. We telegraph you to-day's market. We quote No. one sp'g at 1.20; No. one red winter sold to-day at 1.72½. There is but little offering. We enclose b. e. of some of the grain ship'd. Enclosed find market report.

Truly, &c.,

FORSYTH & BROWN.

189 ROBERT FORSYTH. GEORGE T. BROWN.

OFFICE OF FORSYTH & BROWN,
COMMISSION MERCHANTS,
Chicago, Aug. 8th, 1865.

Mess. BRANDIES & CRAWFORD,
Louisville, Ky.:

GENTLEMEN: We are in receipt of your telegram of the 7th inst., saying, "Don't buy winter red at above $1.70." We quote the market to-day as follows: No. one red winter, 1.75, with but little offering; No. two, do., 1.50; No. one spring, 1.22 c 1.22½. We do not look for much decline in red winter so long as there are so many buyers in the market for it. There are large orders from Indiana here; and we are inclined to think your mills will be compelled to grind some spring wheat. We will to-morrow send you statement of purchases so far. We enclose b. s. for one car more; also market report of to-day. We would be pleased to hear from the wheat—if it suits.

Truly, &c.,

FORSYTH & BROWN.

190 ROBERT FORSYTH. GEORGE T. BROWN.

OFFICE OF FORSYTH & BROWN,
COMMISSION MERCHANTS,
Chicago, Aug. 10th, 1865.

Mess. BRANDIES & CRAWFORD,
Louisville, Ky.:

GENTLEMEN: We enclose b. s. for three cars wheat. We quote the market to-day entirely unsettled, selling early at 1.25½, advancing to 1.28, and again down to 1.24½, and now, at 5 o'clock, selling at 1.26. We find that the storm which passed over this city yesterday was quite extended, and did a large damage to grain. There is now no doubt but there will be a large crop of wheat, and that the quality will be poor. No. one wheat, the way it looks now, will be a scarce commodity. Red winter was in request to-day, with but little offering, at 1.75 to 1.77½. We are getting your wheat off as fast as we can get cars. We enclose market report of to-day.

Truly, &c.,

FORSYTH & BROWN.

sythe and wife, and in consideration of $1.00, does remise, release, sell, convey, and quitclaim to 2d party all the right, title, and interest, which he, 1st party, has in and to premises 1st above described. Covenants against acts of grantor.

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1-7 ROBERT FORSYTH. GEORGE T. BROWN.

OFFICE OF FORSYTH & BROWN,
COMMISSION MERCHANTS,
Chicago, July 31st, 1865.

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Louisville, Ky.:

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Louisville, Ky.:

GENTLEMEN: We are in receipt of your valued favor of the 2nd inst., and contents have attention. We note your remarks in regard to making drafts or remitting. We had, before receiving your letter, made draft on a/c. of purchases for $2,500,00, and have made arrangements here so that it will be cheaper to draw than any other way, as, for instance, your exchange costs you three ¼ % premium there, and we would be obliged to make a discount of ⅛ to ¼ here in order to sell it.

Now we draw payable in par funds there, and it costs you nothing either here or there. We understand your letter to mean, in regard to price here, when you say not to go beyond 15 to 16 c. per bush. at the current rate, that you mean New York prices. Are we correct? For instance, if it is worth 1.80 in New York, we should not pay over $1.65 here. We telegraph you to-day's market. We quote No. one sp'g at 1.20; No. one red winter sold to-day at 1.72½. There is but little offering. We enclose b. e. of some of the grain ship'd. Enclosed find market report.

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FORSYTH & BROWN.

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COMMISSION MERCHANTS,
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Louisville, Ky.:

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Truly, &c.,

FORSYTH & BROWN.

190 ROBERT FORSYTH. GEORGE T. BROWN.

OFFICE OF FORSYTH & BROWN,
COMMISSION MERCHANTS,
Chicago, Aug. 10th, 1865.

Mess. BRANDIES & CRAWFORD,
Louisville, Ky.:

GENTLEMEN: We enclose b. s. for three cars wheat. We quote the market to-day entirely unsettled, selling early at 1.25½, advancing to 1.28, and again down to 1.24½, and now, at 5 o'clock, selling at 1.26. We find that the storm which passed over this city yesterday was quite extended, and did a large damage to grain. There is now no doubt but there will be a large crop of wheat, and that the quality will be poor. No. one wheat, the way it looks now, will be a scarce commodity. Red winter was in request to-day, with but little offering, at 1.75 to 1.77½. We are getting your wheat off as fast as we can get cars. We enclose market report of to-day.

Truly, &c.,

FORSYTH & BROWN.

191 ROBERT FORSYTH. GEORGE T. BROWN

OFFICE OF FORSYTH & BROWN,
COMMISSION MERCHANTS,
Chicago, Sept. 5th, 1865.

MESS. BRANDIES & CRAWFORD,
Louisville, Ky.:

GENTLEMEN: We are in receipt of your valued favor of the 3rd inst., and contents have attention. We bought for you two thousand bushels No. one spring wheat at $1.32. The market this p. m. is 1.33, with buyers at that price. We have expected to see the price decline in wheat, but there seems to be a determination on the part of speculators to keep the price up. They have succeeded so far, but how long they can do so is a matter of speculation. We quote No. one red at 1.70, No. 2 do., 1.32 to 1.35. We will forward this wheat as quick as we can get the cars. Enclosed please find market report. We have to-day removed to our new office in the Chamber of Commerce.

Truly, &c.,

FORSYTH & BROWN.

192 And the cross-complainant, to sustain the issues on his part, offered and read in evidence the depositions of Robert C. Wright, John A. Tyrrell, and Robert Forsythe, said depositions having been opened and filed April 11th, 1877, which said depositions, with the exhibits referred to therein, are in the words and figures following, to wit:

193 In the circuit court of the United States, northern district of Illinois. In equity.

ADOLPHUS BRANDIES AND WILLIAM W. Crawford
vs.
ROBERT FORSYTH ET AL. } Original bill.

JOHN COCHRANE
vs.
ADOLPHUS BRANDIES ET AL. } Cross-bill.

To Messrs. Goudy, Chandler & Skinner, solicitors for defendants Robert Forsyth, Wallace & John Forsythe, in the cross-bill filed in this cause:

GENTLEMEN: Take notice that a rule has been this day entered by the court, upon our application, in above cause, requiring the defendants in the cross-bill to answer the same within ten days from this date.

Also take notice that Allen Boyer, esq., a notary public, has been appointed by the court a special examiner to take depositions in this cause, and that we shall proceed to take the depositions of witnesses before him at our office, No. 99 Madison street, Chicago, in pur-
194 suance of the stipulation filed in this cause, at two o'clock in the afternoon, on the nineteenth day of December, A. D. 1876, on behalf of John Cochrane.

Yours, &c.,

SCOVILLE & BAYLEY,
Sol'rs for John Cochrane.

Dated Chicago, December 14th, A. D. 1876.

Rec'd copy of above notice Dec. 14, 1876.
GOUDY, CHANDLER & SKINNER,
Sol'rs for Def'ts Wallace & Forsythe.

In the circuit court of the United States, northern district of Illinois.
In equity.

ADOLPHUS BRANDIES AND WILLIAM W. Crawford
vs.
ROBERT FORSYTH ET AL. } Original bill.

JOHN COCHRANE
vs.
ADOLPHUS BRANDIES ET AL. } Cross-bill.

To Messrs. Crawford and McConnell, solicitors for defendants Brandies and Crawford in cross-bill:

GENTLEMEN: Take notice that a rule has been this day entered by the court, upon our application, in above cause, requiring the defendants in the cross-bill to answer the same within ten days from this date.

195 Also, take notice that Allen Boyer, esq., a notary public, has been appointed by the court a special examiner to take depositions in this cause, and that we shall proceed to take the depositions of witnesses before him at our office, No. 99 Madison street, Chicago, in pursuance of the stipulation filed in this cause at two o'clock in the afternoon on the nineteenth day of December, A. D. 1876, on behalf of John Cochrane.

Yours, &c.,
SCOVILLE & BAYLEY,
Sol'rs for John Cochrane.

Dated Chicago, December 14th, 1876.

Received copy of foregoing notices December 14th, 1876.
CRAWFORD & McCONNELL,
Solicitors for Pl'ff.

In the circuit court of the United States for the northern dist. of Illinois. In equity.

BRANDIES ET AL.
vs.
FORSYTH ET AL. } Bill.

COCHRANE
vs.
BRANDIES ET AL. } Cross-bill.

Depositions of Robert C. Wright, 3 (D. C.); John A. Tyrrell, 39; Robert Forsyth, 53.

196 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois. In equity.

ADOLPHUS BRANDIES AND WILLIAM W. Crawford
vs.
ROBERT FORSYTH, JOHN FORSYTHE, JAMES D. Wallace, and John Cochrane. } Original bill.

JOHN COCHRANE
vs.
ADOLPHUS BRANDIES, WILLIAM W. CRAWford, Robert Forsyth, James D. Wallace, and John Forsythe. } Cross-bill.

Depositions of witnesses taken in the above-entitled cause by and before me, Allen Boyer, a special commissioner appointed by the court therein to take depositions of witnesses, commencing at 2 o'clock in the afternoon of the 19th day of December, A. D. 1876, at the office of Messrs. Scoville and Bayley, number 99 Madison street, in the city of Chicago, in said northern district of Illinois, in pursuance of stipulation filed in said cause, and of notices given to the solicitors of the other parties thereto by Messrs. Scoville and Bayley, solicitors for defendant
197 John Cochrane, which notices with proof of service thereof are hereto annexed.

Present, on behalf of said John Cochrane, George Scoville, his solicitor, and no one appearing for any of the other parties.

The first witness called on behalf of said John Cochrane, complainant in the cross-bill and one of the defendants in the original bill, was—

ROBERT C. WRIGHT, who being duly sworn was examined and testified as follows, to wit:

Q. What is your name, age, residence, and occupation?

A. My name is Robert C. Wright. I am in the sixty-fourth year of my age. I am of the firm of Wright & Tyrrell, money-lenders, in the city of Chicago, county of Cook, and State of Illinois.

Q. Do you know of your firm making a loan to Robert Forsyth in the early part of the year 1870? If so, state the facts in relation thereto, for whom the money was loaned, the amount thereof, and the securities taken.

A. The firm of Wright & Tyrrell did make a loan to Robert Forsythe on the 10th day of March, 1870; fifteen thousand dollars was the amount of the loan. John Cochrane, of the city of New York, advanced the money: it was made on his account. The security was lots four, five, and six, in E. L. Sherman's subdivision of lots four, five, and six,
198 in block one in Clark's addition, and lot one of block one of the west half of block two, of assessor's subdivision of forty-nine and a half acres in the southwest fractional quarter of section twenty-two, township thirty-nine north, range fourteen east of the third principal meridian.

Q. Do you know where the property is located?

A. On Prairie avenue, on the east side of the street, facing west, a little south of Sixteenth street, in the city of Chicago aforesaid.

Q. What security was given on that property?

A. A deed of trust to George Scoville, trustee, by Robert Forsythe, and notes made by him, one for the principal sum of fifteen thousand dollars, payable five years after date, and the others were six hundred and seventy-five dollars each, due each and every six months, for interest, and all the notes bore interest after due.

Q. Was the interest paid as it matured from time to time on that loan?

A. Robert Forsyth paid interest twice; first, September tenth, 1870, and March tenth, 1871. The interest that came due September tenth, 1871, he defaulted in; and also the interest due March tenth, 1872, he defaulted in.

Q. Is John Cochrane known by any other name or appellation?

A. He is most known in New York by the name of General Cochrane.

Q. Did he personally have anything to do with the making of said loan to Forsythe or collecting the interest thereon?

199 A. Nothing whatever; he sent in the money to loan and we loaned it out, to the best of our belief and judgment, for his interest, and did the whole business simply as agents for Mr. Cochrane.

Q. Did you have furnished an opinion of title for the purpose of making said loan?

A. We did.

Q. State the facts in relation to that.

A. We had the opinion of title of Walker, Dexter & Smith, dated the fourteenth day of March, 1870, which opinion of title we still have in our possession, and a copy of which I produce, to be annexed to this my deposition, marked Exhibit A.

Q. I see the opinion of title you mention refers to an abstract of title made by Jones & Sellers, bearing date February 15th, 1870, of said lots four, five, and six; did you have that abstract?

A. We did.

Q. Was it furnished you at the time of the loan?

A. It was; and we kept it in our vault for some time among our abstracts in the usual way, which is putting them in envelopes and putting the name on the end, and then they are put in alphabetically one after the other; all the A's together and all the B's together, and so on down to the end of the alphabet.

Q. What was done with it; have you it now?

A. We have not got it now. John Forsythe came and borrowed it for the use of Messrs. Goudy & Co., who were conducting a suit

200 in connection with the property for him.

Q. When was that?

A. I can't state the date; I should think it was two years and a half ago that he got it.

Q. This opinion I see also speaks of a deed from William R. Arthur to Nathan Corwith, not yet recorded, bearing date January 4th, 1870, and a deed from Nathan Corwith and wife to Robert Forsythe, bearing date the 12th day of March, 1870, not yet recorded. Do you know anything of those deeds; if so, what?

A. Yes, sir; they were put into our hands either by Nathan Corwith or Robert Forsythe at the time we made the loan and before we paid out the money. We placed them on record in the recorder's office and

received them duly back after recording, to the best of my recollection.

Q. Did you have any continuation of said abstract of title made by Jones & Sellers with reference to the loan you made to Robert Forsythe; and, if so, what?

A. I did, by Chase Brothers & Co.; theirs is continued down to March 15th, 1870, the day that they delivered it, and shows the record of a deed in the recorder's office from William R. Arthur to Nathan Corwith, filed for record March 15th, 1870; also shows the record of a deed in the recorder's office from Nathan Corwith and Mary E., his wife, to Robert Forsyth, dated March 12th, 1870, filed for record
201 March 15th, 1870; and also shows record of a trust-deed securing said loan from Robert Forsyth, widower, to George Scoville, dated March 10th, 1870, given to secure fifteen thousand dollars five years after date, and filed for record March 15th, 1870; which continuation of abstract of title is still in our possession, and a copy of which I produce to be annexed to my deposition, marked Exhibit B.

Q. How long had you been engaged in business as a note-broker or loan-agent in Chicago at the time when you made the said loan to Robert Forsythe in March, 1870?

A. About twelve years.

Q. Were you accustomed to the taking of security on real estate for loans at and before that time in Chicago?

A. Yes, sir.

Q. Did you know the firm of Jones & Sellers, engaged in making abstracts of title, at that time?

A. I did.

Q. Were their abstracts considered good and sufficient for the purpose of making loans?

A. Yes, sir.

Q. How was it with the firm of Chase Brothers & Co.?

A. They were considered good, too, sir.

Q. Were they engaged in the business?

A. They were engaged in the abstract business.

Q. Did you know the legal firm of Walker, Dexter & Smith?

202 A. I did.

Q. What was their standing as attorneys, and what credit was due to their opinion of title at the time you obtained it in March, 1870?

A. I supposed that their standing was among the very highest in the profession, and that an opinion of title given by them was one that could be relied on.

Q. State whether or not you did rely upon it in making this loan to Robert Forsythe.

A. We did, most implicitly.

Q. Did you do or have done what was required by that opinion for the purpose of making this security?

A. We did. The only thing I recollect they required was that we should get two deeds, one from William R. Arthur to Nathan Corwith and the other was from Nathan Corwith and wife to Robert Forsyth. This being done and put on record, their opinion of title stated that the title would be then good in Robert Forsyth at the date thereof.

Q. Did Robert Forsythe make any representations to you in making that loan as to the purpose for which the money was wanted; and, if so, what?

A. None that I recollect.

Q. Did you understand from Robert Forsyth, or in any other manner,

as to what was to be done with the money obtained on said loan, or the necessity that existed for his having it or obtaining it; and, if so, what information did you have?

203 A. I understood that the major portion was to be paid to Corwith before he could get the deed from Corwith to himself. It was to pay an indebtedness to Mr. Corwith from Robert Forsythe, and that Corwith held the title, and would hold it till he got his money.

Q. Do you know how much of that money was paid to Corwith?

A. I do not, exactly; but my impression is, about ten thousand dollars.

Q. Did the firm of Wright & Tyrrell continue to have charge of this business for John Cochrane in Chicago?

A. They did.

Q. Exclusively?

A. Exclusively.

Q. Up to what time?

A. Up to the present time.

Q. What was the first information you had of any claim on the part of Brandies and Crawford against this property?

A. The first intimation was after Robert Forsyth had defaulted, and John Forsythe came up to see us in order to make some arrangement, if he could, on behalf of Robert Forsythe. It was then intimated to us by said John Forsyth that there was some claim that he didn't take much account of; but still it was there. That was in the beginning of March, 1872.

Q. What was John Forrythe's first connection with the business? How did it come about, and what was said and done by him?

204 A. After Robert Forsyth had defaulted, September 10th, 1871, and subsequently, on March 10th, 1872, John Forsythe came up to our office and stated that Robert Forsyth had been boarding with him for some time; that heretofore Robert had been very wild, but through the influence of Mr. John Forsythe and his wife and friends that he had become now quite steady; had joined the church and become a member thereof, and that they were now exceedingly anxious to assist him. If they could do anything to assist him in this matter they wished to do it, to save him harmless in the matter, and save what there was over and above the debt. He then told us about this cloud upon it, this claim of Brandies and Crawford, but said he thought there wasn't much in it; that they were going to contest it, and Goudy and Chandler were to be their attorneys.

Q. Did he make any proposition, and, if so, what, in relation to the property?

A. Yes; he made the proposition that if we would advertise the property under the trust-deed that he would provide a purchaser for it, provided that we would make the loan from fifteen thousand to seventeen thousand, and make a new loan for five years without commission. He said that the best way to cut off all other claims would be to have a sale made under the trust-deed, and he said he would have James D Wallace purchase the property at the sale, provided we

205 would make him a new loan of seventeen thousand dollars without commissions. There was no money to be paid at the sale. It was simply an adjustment or rearrangement of the security, and the inducement for us to do that was this: that he would put in two additional lots as extra security upon which there was no cloud, and, in addition, that he would guarantee the payment of the principal note, and of each of the interest notes that should be made by said Wallace at maturity.

Q. What action was taken, if any, in the matter as proposed by John Forsythe?

A. Thereupon we applied to George Scoville, the trustee, to advertise and sell under the powers of the trust-deed, and he advertised the sale in pursuance of the application on the 17th day of April, 1872, and the property was struck off to James D. Wallace in pursuance of the arrangement made with John Forsythe.

Q. What was done, if anything, in relation to an arrangement of the securities?

A. James D. Wallace, then a bachelor, made a trust deed on the 17th day of April, 1872, which deed was recorded April 22d, 1872, in book 94 of records, page 55, a copy of which I produce, to be made part of this deposition, marked Exhibit C; at the same time said Wallace made
206 one note for the principal sum of $17,000, due in five years after the date thereof, payable to the order of John Cochrane, and also the other certain promissory notes, which were of the same date, given for interest, payable to the order also of John Cochrane, each for the sum seven hundred and sixty-five dollars, payable at intervals of six months during the term of the loan. The payment of all of said notes was guaranteed on the back by John Forsythe, and were all delivered to the firm of Wright and Tyrrell for John Cochrane, of New York.

Q. State whether or not you consulted Robert Forsyth in reference to the arrangement proposed by John Forsythe, and which was carried out as you have stated through Wallace; and, if so, what he said about it?

A. We saw Robert Forsythe and he said that would be all satisfactoy; that John Forsythe was going to help him in the matter.

Q. What representations, if any, did John Forsythe make in the transaction of that business as to what would be done to perfect the title of said lots?

A. He said the matter was in the hands of Goudy & Chandler, and they were taking all legal means to have the title cleared up, and when we asked him about the taxes he said he had paid Robert Forsythe's taxes for some time, and he would take care of them; that they were all right.

Q. What did your firm then do, if anything, and what arrangement, if any, was made as to perfecting the title of said premises
207 and clearing up claims against the same?

A. We just turned the whole matter over to John Forsythe at his request and upon his agreement to attend to it, to have the title perfected, and depended upon his paying the taxes. He said he had always done so, and was doing so yet; and also upon his carrying on any proceedings necessary to remove the cloud on the premises caused by the claim of Brandies & Crawford, which he agreed to have done through his attorneys, Messrs. Goudy & Chandler, without any cost to us, and we delivered him the abstract of title then, or very shortly afterwards, to put into his attorney's hands.

Q. What was the purpose of that arrangement?

A. It was to perfect the title in Wallace so that the security we had taken from him by trust-deed would be good.

Q. How was that amount of seventeen thousand dollars, the loan to Wallace, made up?

A. The indebtedness of Robert Forsyth under the former deed of trust, with the accrued interest, the expenses of sale and foreclosures, stamps, recording, &c., made up the total of seventeen thousand dollars. The items of expense over and above the debt of Robert Forsyth, with

accrued interest, making up the seventeen thousand dollars were paid by Gen. Cochrane.

Q. Who, if any one, paid the interest on the Wallace loan after it was made, and for how long time was it so paid?

208 A. John Forsythe paid the interest each and every time when it was paid. He paid and took up the first six interest notes, making three years' interest, and made default on the seventh, which was due in October, 1875.

Q. Did said Wallace do anything about the payment of interest, or interest himself in any manner in the property or the business after the making of said deed of trust and notes?

A. Never, in any shape, form, or manner.

Q. Who was the man apparently in interest, or who took charge of the business, and who did whatever was done?

A. John Forsythe.

Q. What was reputed to be the pecuniary circumstances of John Forsythe at that time when this arrangement was made to take the title in Wallace?

A. He was supposed to be rich. He was living in a large house that had cost sixty thousand dollars, and his other means was in proportion, or supposed to be.

Q. It was so generally understood, was it?

A. It was so generally understood; yes, sir.

Q. Did you understand at the time anything in relation to the pecuniary circumstances of said James D. Wallace; and, if so, what?

A. We understood that James D. Wallace was not a man of means; we understood at the time that he was a relation of John Forsythe, and that the latter was merely using his name in the business to hold

209 the title and to make the papers which were guaranteed by John Forsythe, and which John Forsythe was to pay, as it was understood.

Q. Do you know who had possession of the property in question before and after the said deed of trust by Wallace?

A. When we made the original loan to Robert Forsythe, he was in possession of the property. He leased to Lazarus Silverman from the 1st day of May, 1870, to the 1st day of May, 1871, at a rental of eighteen hundred dollars a year, payable monthly, in sums of one hundred and fifty dollars each, and which rent was collected by the firm of Wright & Tyrrell, for the account of Robert Forsyth, and out of that his interest was paid, which was all the interest he ever paid on his loan. After Silverman left, I don't know who was in possession until in the spring of 1872, and from that time on for the three years during which John Forsythe paid interest, I understood from him that he was in possession by a tenant, and receiving the rents at the rate of eighteen hundred dollars, as I understood from Wallace.

Q. What was the first you knew of John Forsythe having any claim against the property by way of tax-sale or tax-title?

A. I think our first knowledge of that fact was when we made the sale, May 1st, 1876, under the trust-deed executed by Wallace to George Scoville, trustee. John Forsythe was present at that sale, and then stated that he claimed the premises by virtue of a tax-sale

210 or tax-deed.

Q. Do you know the size and general description of the premises in question?

A. I know pretty near.

Q. State what you do know about that?

A. The three lots, 4, 5, and 6, are 75 feet front on Prairie avenue, facing west. I should think they were of an average depth of 150 to 160 feet. The east or rear line of the lots abuts on the land of the Illinois Central Railroad, and runs northwesterly and southeasterly, lot 6 being the southerly lot and the largest. Lots 2 and 3 have a frontage of 50 feet on Prairie avenue, and the north line of lot 2 is marked on Pelzer's map as 120 feet in depth; lot 3 adjoining lot 4 aforesaid making a continuous front on Prairie avenue of 125 and a fraction, the fraction being a small portion off the south side of lot 1, adjoining lot 2. The house is on lots 5 and 6.

Q. Do you know whether or not it is claimed that the barn and carriage-house extend over on the land of the Illinois Central Railroad Company?

A. I do know that it is.

Q. What is the first you heard of that?

A. The first I heard of that was from George Scoville during the time it was being advertised under the sale that took place May 1st, 1878; up to that time I had no such idea.

211 Q. Have you examined the premises to see whether it was apparently so or not?

A. I have since that, and it apparently is so. I have no doubt it is.

Q. The buildings project over how far?

A. I think in all, probably ten feet, might be a little more.

Q. That being so, what difference, if any, in value of the barn and outbuildings so projecting over on the Illinois Central land would there be, that is, what difference would it make in the value of the place whether the buildings were all on the premises proper, or partly on the Illinois Central land?

A. It makes the barn and outbuildings of no value to the place, just the same as if there were no barn, as it wouldn't pay for tearing down and building up again, being brick and not susceptible of being moved without tearing down.

Q. Was there any depreciation in the value of the property from the time you first made the loan to Robert Forsythe up to May 1st, 1876?

A. Oh, yes; considerable.

Q. From what causes?

A. From the general depreciation of property from what is generally known as the financial panic of 1873, and also from the total neglect of the improvements, allowing them to become depreciated by non-protection; for instance, the conservatory, which had been an excellent building of its kind, was allowed to have all its glass broken out,

212 or pretty much so; for want of paint the wood work had rotted down, and it had become entirely dilapidated; almost worthless. At the time we made this loan to Robert Forsyth this conservatory was a large, magnificent segment of a circle nearly a 100 feet long, and at that time worth several thousand dollars. On the 1st of May, 1876, it was almost entirely ruined. It was not worth removal for the material in it. The barn and outhouses were going to decay and hardly worth repairing. The house, so far as could be seen outside, and looking through the windows, was also in a dilapidated condition, John Forsythe having himself stated at the time that thieves had broken in and carried off the plumbing and gas-fixtures; also on account of the large deduction in the prices of building material and of labor since the loan was made to Robert Forsythe, the improvements are of considerable less value. Taking all things together the depreciation must be from 60 to 70 per cent. in the improvements.

Q. You may state what the premises were considered to be worth at the time you made the loan to Robert Forsythe, altogether, improvements and all.

A. Thirty thousand dollars, at least.

Q. What proportion of the whole value of the premises was a reasonable one to fix on the buildings at the time you made the loan to Robert Forsyth?

213 A. About 25 per cent. on the whole—that is, on the whole five lots.

Q. On the three lots, at that time, what, in your opinion, was the relative value of the improvements to the whole?

A. I should think it would be about the same—about 25 per cent.

Q. Is there anything, and if so, what, affecting the value of the improvements growing out of the house being old style, or not appropriate to the locality?

A. When the house was originally built it was fit for the locality; but lately, in consequence of a very superior class of buildings going up, it is totally inappropriate, and would add little or nothing to the value of the real estate.

Q. Has Gen. Cochrane paid any taxes or assessments on the property since he purchased it, May 1st, 1876; and if so, what and when?

A. Yes, sir; he has. On the 18th day of August, 1876, he paid through our firm seven hundred and fifty-eight dollars and fifty-one cents, in full of State, county, town, school, and city taxes for the year 1875; and also, on the same day, for South Park assessments and costs and accrued interest, thirty-one dollars and four cents. We took receipts for said taxes and assessments in the name of John Cochrane, which I produced, to be annexed to my deposition; the first one, marked Exhibit D, and the other Exhibit E.

ROBERT C. WRIGHT.

214 Subscribed and sworn to before me this 29th day of December, A. D. 1876.

ALLEN BOYCE,
Special Examiner.

Adjourned till 3 p. m., Dec. 20, 1876.

3 O'CLOCK P. M., *December* 20, 1876.

JOHN A. TYRRELL, a witness, called on behalf of John Cochrane, complainant in the cross-bill and one of the defendants in the original bill, being duly sworn, was examined and testified as follows, to wit:

Q. What is your name, age, residence, and occupation?

A. My name is John A. Tyrrell; age, about sixty; occupation, note-broker. I am one of the firm of Wright & Tyrrell, composed of Robert C. Wright and John A. Tyrrell.

Q. Did you know anything personally or have anything to do with a loan made for John Cochrane to Robert Forsythe, in March, 1870, by the firm of Wright & Tyrrell?

A. No; I was in the country at that time.

Q. How long have you lived in Chicago, and have you been familiar with the values of real estate, during the time you have lived here, in different parts of the city?

A. I have resided here most of the time since 1851. I have been engaged in business with my firm since the spring of 1858. The loaning of money involves the necessity of knowing something of the values of real estate.

215 Q. What was the first personal knowledge you had of the indebtedness of Robert Forsyth to John Cochrane?

A. About April, 1870.

Q. Have you been acquainted since that day with the business transactions in the office of Wright & Tyrrell?

A. I have.

Q. Did you know of the transactions in April, 1872, when the trust-deed was foreclosed, which was executed by Robert Forsyth, to secure the fifteen thousand-dollar loan made by your firm to him for John Cochrane?

A. I did.

Q. Did you have any interview in that connection with John Forsythe?

A. I did.

Q. Where?

A. At the office of Wright & Tyrrell.

Q. You may state what negotiations, if any, were had between your firm and John Forsythe, if any, in relation to that matter?

A. We had previously notified Robert Forsyth that his interest was past due, and been dunning him and threatening him for a long time, as the result of that, or in answer to those demands on Robert Forsyth, John Forsythe came to our office and suggested that we had better foreclose the trust-deed, and at the sale he would procure some one to bid it off at a certain price, provided there were no other bidders,
216 and provided we would make a new loan to the purchaser for a certain amount agreed upon—$17,000, on five years' time. In consideration of that he would put in two more lots as security, and in addition to that would personally guarantee the payment of the notes.

Q. Did he state whom that person or purchaser would be, whom he would furnish?

A. He did. He said it would be James D. Wallace.

Q. Was anything said by John Forsythe during those negotiations in relation to his acting for Robert Forsyth in the matter; and, if so, what?

A. He remarked that he wanted to save something for Robert out of that property. He further said that he had some little claim against the property for taxes; but in this arrangement that would be cleared up; that he would attend to that, personally, himself. He said there was also a suit pertaining to the title to a portion of this property, but claiming that his attorneys were attending to it, and he would have no difficulty in quieting the whole title, and would do so.

Q. Did he say who his attorneys were in the matter?

A. He did. He said Goudy & Chandler.

Q. Was anything said by John Forsythe during these negotiations or any propositions made by him in relation to the expense of proceedings to quiet the title of the property; and, if so, what?

A. He said General Cochrane should be saved harmless from any expense of that kind, and the property itself should be charged
217 with it; it should be done at his own expense.

Q. What did your firm do in response to the propositions made by John Forsythe?

A. We went on and had the property sold and advertised by the trustee, Mr. George Scoville. It was sold to James D. Wallace. Thereupon we had him execute the papers for the $17,000 loan. This was about the 17th of April, 1872, when the papers were executed by Wallace. John Forsythe then guaranteed the notes. There was one

principal note for $17,000, due in five years after the date thereof, payable to John Cochrane; also ten interest notes of the same date each for the sum of $765.00, payable one every six months thereafter until the maturity of the loan, with interest on each of the notes after due at nine per cent. per annum. Those were the notes that were guaranteed by John Forsythe.

Q. Were you present at that trustee's sale?

A. I was.

Q. Was there any other bid except that of said Wallace?

A. I think there was not. My recollection is that it was sold on a single bid to said Wallace, in pursuance of the arrangement with John Forsythe. It was a continuation of the old loan made to Robert Forsythe, and carried out agreeable to an arrangement with John Forsythe.

Q. Did you have any interview in relation to that same business with Robert Forsyth or with James D. Wallace? 218

A. I did with Wallace.

Q. State what was said by Wallace at that interview.

A. Mr. Wallace said that it was no interest of his; that he didn't want to become involved in the case in any way or responsible, and that John Forsythe assured him that he should be held harmless in the matter, that he simply executed those papers at the request of John Forsythe.

Q. What was done, if anything, by your firm then towards clearing up the title to the property?

A. We handed the abstract of title to the property over to John Forsythe, who was to put it into the hands of his lawyers, as he said, and clear up the title to the property at his own expense. We left it wholly with him to attend to, and relied upon his doing it. He was to clear it of tax sales, and was also to obtain a release or to dispose of the cloud on the title that arose from the suit of Brandies and others, against Robert Forsyth and others, relating to the property in the United States circuit court.

Q. What was the next information you had after that time, in relation to any claim against the property of any person for taxes or tax sales or under tax certificates?

A. On the first of May, 1876, at the time of the trustee's sale under the trust deed, given by said Wallace on the premises, John Forsythe announced that he had a tax title on the property. That was the first information I had that there was any claim of any person on account of taxes against this property. I supposed up to that 219 time that John Forsythe had cleared it all up and attended to the proper payment of taxes on the property, according to the understanding had with him.

Q. Do you know where the lots are located which were given as security for this loan; if so, you may state?

A. On the east side of Prairie avenue, a little south of Sixteenth street, in the city of Chicago; I was present at the sale of the premises on the first of May, last; it was made on the premises.

Q. Who else was present at that sale?

A. There was Mr. George Scoville, Robert C. Wright, Henry Crawford, John Forsythe, and two or three other persons whose names I don't remember.

Q. What, in your opinion, was that property worth in May last, cash, with a good title?

A. Not to exceed $200 per front foot, and I hardly think it could

have been sold at that at that time; I don't think it could have been sold for that at any time since May last.

Q. Did you know anything personally of Corwith's holding the property or the payment of money to him?

A. I did not.

Q. Had the property depreciated in value any since 1870, up to May 1876, and, if yea, to what extent?

A. It had largely depreciated: I should say about fifty per cent. The improvements I consider worth but very little. They had depreciated a good deal more than fifty per cent.; I should say the land itself had depreciated nearly fifty per cent. and the improvements seventy-five per cent.

219½

JOHN A. TYRRELL.

Subscribed and sworn to before me this 29th day of December, A. D. 1876.

ALLEN BOYER,
Special Examiner.

Adjourned until 3 o'clock p. m., December 21st, 1876.

At three o'clock p. m., December 21st, 1876, the solicitor for John Cochrane offered in evidence a portion of an original abstract of title, made by Jones & Sellers, September 12, 1871, being No. 19 of instruments and tax sales shown on said abstract as follows:

Tax sale.

19. Sale Nov. 14, 1870, for State & co. taxes of 1869, S. ½ of lot 6, lot 1, and all of lots 2, 3, 4, 5, and 6 of Sherman's sub'd'n of lots 4, 5, & 6, block 1, Clark's add'n, lot 1, bl'k 1 & N. ½ B. div., ass. div. of *sec.* ¼ sec. 22, T. 39, R. 14, sold to J. Forsythe for the aggregate amount of $183.71.

Also, certified copy of tax deed from Joseph Pollak, county clerk of Cook County, State of Illinois, to John Forsythe dated April 2, 1873, and recorded April 29, 1873, in book 232 of records, at page 119, conveys the south $\frac{1}{16}$ part of lot 1, and all of lots 1, 2, 3, 4, 5, and 6, in Sherman's subdivision of lots 4, 5, and 6 in block 1, of Clark's addition to Chicago, sold December 1st, 1870, for State and county taxes of 1869, to John Forsythe for $187.71

220

Adjourned till 3 p. m., December 22, 1876.

At 3 o'clock p. m., Dec. 22, 1876, the further taking of testimony was adjourned till Wednesday, Dec. 27, 1866, at 3 p. m.

At 3 o'clock p. m., December 27th, 1876—

ROBERT FORSYTH was duly sworn on behalf of Mr. John Cochrane, examined by Mr. SCOVILLE, and testified as follows:

Q. State your name, age, and occupation.

A. Robert Forsyth; fifty years of age; railroad agent.

Q. Are you one of the parties to this suit, and has your deposition been taken before in this cause?

A. I am; I believe it has.

Q. What did you do, if anything, personally in the firm of Forsyth & Brown, and what knowledge, if any, had you of the firm transactions?

A. I done nothing personally, and had no knowledge of their business transactions; none whatever.

Q. What benefit, if any, did you derive from the firm or the firm business?

A. None whatever.

221 Q. What was the first information you had as to the indebtedness of the firm of Forsyth & Brown to the firm of Brandies & Crawford?

A. The first information I had that they were owing Brandies and Crawford was by one of their clerks calling on me. He said there was an indebtedness which I knew nothing about. His name is George S. McKiernan.

Q. Did you ever receive or have the benefit of in any manner any part of the money that Forsyth & Brown obtained from Brandies and Crawford?

A. Not one penny, and knew nothing of it.

Q. Did you know of a creditor's bill prosecuted against you by Brandies and Crawford upon a judgment recovered by them against you in March, 1866, in the United States circuit court for the northern district of Illinois?

A. I believe there was, but I can't be positive.

Q. Do you know the result of that suit?

A. After my examination before Bishop, master in chancery, I thought it was abandoned. I never heard anything more about it after that, and presumed it was abandoned.

Q. Was any demand made on you to turn out property on execution to pay an execution issued on said Brandies and Crawford's judgment against you in May, 1870, or in the spring or summer of 1870?

A. There was not to my knowledge.

Q. Have you any recollection of any such demand being made?

A. I have not.

222 Q. Did you know of any such execution issued on that judgment in the spring or summer of 1870 at the time?

A. No, sir; I did not until after levy.

Q. What was the first knowledge you had of the issue of the execution on said judgment of Brandies & Crawford after March, 1870?

A. It was after Brandies and Crawford had bought in the property on execution.

Q. Where is George F. Brown, your former partner?

A. I don't know, sir; I didn't consider I ever was a partner. I don't believe you can find him. The last I heard of him he was in Boston. I haven't seen him since he left here in 1866.

Q. Where are the account books of Forsyth & Brown?

A. I haven't had them in my possession; never saw them, and don't know where they are.

Q. State whether in your schedule of indebtedness in your bankruptcy proceedings you intended to give the correct address of Brandies & Crawford.

A. I did.

Q. If their address was, in fact, given in said schedule in bankruptcy as Pittsburgh, Pennsylvania, state how that occurred, and why it was so given.

A. It must have been a clerical error, for I gave it Louisville.

Q. Were you present at the trial or examined as a witness in the original suit brought against Forsyth & Brown by Brandies & Crawford in which judgment was obtained in March, 1870?

223 A. I was not.

Q. Why were you not, and why were you not examined as a witness in said case?

A. I don't know; I never was notified.

Q. Did you know when the trial occurred?

A. I did not.

Q. Were Brandies & Crawford notified, or did they have any knowledge of your proceeding in bankruptcy?

A. I presume they had. I presume the attorney notified them. They were scheduled, but I don't know personally.

Q. Were any proceedings commenced or prosecuted to prevent your obtaining your discharge in bankruptcy or to set aside your discharge after it was obtained?

A. None, except the proceedings that were commenced by Brandies and Crawford before Hibbard in 1868. I was discharged before they commenced any proceedings.

Q. What was done in those proceedings?

A. Well, sir, I was merely summoned before the master in chancery and examined there, and that was all I ever heard of it.

Q. Is that the same proceeding which you referred to heretofore in your deposition?

A. Yes, sir.

Q. You speak of that being before Hibbard. Was that before the register in bankruptcy?

A. Yes, sir; the register in bankruptcy. I think that was his name; a large man.

Q. Where was his office at the time?

224 A. At the southeast corner of Randolph and State streets, Garrett block.

Q. Was that where your examination was held?

A. It was.

Q. Who was there present at that examination?

A. I think Colonel William R. Arthur, Nathan Corwith, and Homer N. Hibbard, the register in bankruptcy, and I think Henry Crawford was there.

Q. What was the object, apparently, of that investigation?

A. To set aside my discharge in bankruptcy, the way I understood it.

Q. Is that the proceeding you say was abandoned after that time?

A. I always believed it was abandoned. It was not prosecuted to an end. I was not examined thoroughly. I was told to come back there again, and they never sent for me.

Q. About when was that?

A. I think it was in 1870. I think I was discharged in 1868, and it was either in 1869 or 1870. It was a good while after I was discharged.

Q. Was your discharge a full discharge from all your debts?

A. Yes, sir.

Q. Did your former wife, Mary E. Forsyth, reside upon or occupy the premises conveyed by Horatio G. Loomis to William R. Arthur in trust by a deed dated March 30th, 1861, being the premises on the east side of Prairie avenue, south of 16th street?

A. She did.

225 Q. When and how long did she so reside upon or occupy said premises?

A. From 1861 to 1869—to the time of her death in 1869.

Q. Are there any improvements in the premises in question in the way of works of art, such as statuary?
A. There was.
Q. What?
A. There was the Four Seasons, marble statues.
Q. Where were they placed?
A. Around a fountain.
Q. Who placed them there?
A. I did.
Q. When?
A. I think in 1862.
Q. Are they there now?
A. They are not.
Q. When were they removed?
A. I think about five months ago.
Q. By whom?
A. By me.
Q. Are they claimed by John Forsythe?
A. They are.
Q. Were they placed in his possession or given to him?
A. They were given to him.
Q. What is the cost and value of those?
A. They cost me $250.
Q. The four?
A. The four. I sold them for $200.
Q. When did you sell them?
A. About three weeks ago, at William A. Butler's.
Q. Who is the present occupant of these premises?
A. I am.
226 Q. When did you go into possession thereof this time?
A. About the last of May.
Q. Under whom or by whose authority?
A. Logan D. Wallace.
Q. That is not one of the parties to this suit?
A. No, sir.
Q. Is he a relative of James D. Wallace?
A. A brother.
Q. What claim did he have to the property, if any?
A. I don't know.
Q. Was he in possession before you went in there this last time?
A. He was.
Q. What relative is he of John Forsythe?
A. John Forsythe married his mother.
Q. State whether there were any partnership articles between you and George F. Brown.
A. There was not.
Q. Were the terms upon which such a partnership was to be organized ever fulfilled?
A. They were agreed upon, but never consummated.
Q. What were those terms as agreed upon, as you say?
A. He was to put in ten thousand dollars, and I was to put in twenty. He was to manage the business and I was to attend to my own business.
Q. Was the capital put in by either partner?
A. It was not.

Q. What was the occasion of your advertising or publishing a notice of dissolution of the firm, as stated in your former deposition?

227 A. We was to confine ourselves strictly to a commission business. I found that he was doing outside business, speculating, and I notified him that that was contrary to our agreement, and I wouldn't be a party to it, and notified him that I would withdraw from the concern, and did immediately withdraw. He plead with me not to do it, saying it would injure his credit. I told him I couldn't help that: I wouldn't be a party to any such business.

I wish to add in explanation that where I have spoken of my examination before the master in chancery in this deposition, or in my former deposition, I had reference to the examination that was had before Mr. Hibbard, which was the only examination to which I was ever subjected touching my bankruptcy or the affairs of Forsyth and Brown. I do not know Mr. Bishop, master in chancery, and am but slightly acquainted with Mr. Hibbard.

ROB'T FORSYTH.

Subscribed and sworn to before me this fifth day of January, A. D. 1877.

ALLEN BOYER,
Special Examiner.

228 *Encumbrance.*—Robert Forsythe (widower) to George Scoville. Stamp, 815. Trust-deed dated M'ch 10, 1870. Whereas Rob't Forsyth has executed one note bearing even date herewith, payable to the order of John Cochrane, 5 y'rs after the date thereof, for $15,000; also 10 other notes bearing even date herewith, payable to the order of John Cochrane, given for interest, each for $675 & due as follows: 6, 12, 18, 24, 30, 36, 42, 48, 54, & 60 months after the dates thereof, all of said notes payable at the National Bank of Commerce, New York City, with int., after due, at 9 p'r c't p'r annum:

Now, to secure payment, &c., conveys lands in the city of Chicago, Cook Co., Ills., to wit: Lots 4, 5, & 6 of E. L. Sherman's subd'n of lots 4, 5, & 6, in block 1, of Clark's add'n to the city of Chicago, said add'n being a part of the SW. frac'l, ¼ of sec. 22, T. 39 N., R. 14 E., in Cook Co., Ills. For covenants to pay taxes, insure buildings, &c., & for power of sale, see record. Homestead rights waived. Ack'g'd M'ch 15, 1870.

Filed for record M'ch 15, 1870.

No search made

CHASE BROS. & CO.

All the right, title, interest, &c., he (Arthur) has in & to the following-described premises by virtue of the above-mentioned deeds

229 & proceedings, to wit: Lots 4, 5, & 6 of E. L. Sherman's subd'n of lots 4, 5, & 6, in block 1, of Clark's add'n to the city of Chicago, said add'n being a part of the SW. frac'l ¼ of sec. 22, T. 39 N., R. 14 E., in Cook Co., Ills. Covenant against acts of Arthur.

(Signed) W. R. ARTHUR, *Trustee.* [SEAL.]

Ack'g'd Jan'y 5, 1870.

Filed for record March 15, 1870.

Nathan Corwith & Mary E., his wife, to Robert Forsyth. Stamp, 15. Q. C. deed dated M'ch 12, 1870; consid'n, $15,000; conveys lots, 5, & 6 in E. L. Sherman's subd'n of lots 4, 5, & 6 in block 1 of Clark's

add'n to the city of Chicago, in Cook Co., Ills. Homestead rights relinquished. Ack'g'd M'ch 14, 1870. Filed for record M'ch 15, 1870.

230 *Exhibit A to deposition of Robert C. Wright—Allen Boyer, special examiner.*

We have examined the abstract of title made by Jones & Sellers, and bearing date February 15th, 1870, of lots four, five, and six, of E. L. Sherman's subdivision of lots four, five, and six, in block (1) one, of Clark's addition to Chicago, said addition being a part of the southwest fractional quarter of section twenty-two (22), township thirty-nine (39) north, of range fourteen (14) east, of the 3d P. M., in the county of Cook and State of Illinois, together with a deed from William R. Arthur to Nathan Corwith not yet recorded, but which bears date January 4th, 1870, and a deed from Nathan Corwith & wife to Robert Forsyth bearing date the 12th day of March, 1870, and not yet recorded, both of which deeds convey the property above described, and we are of the opinion that the title to said premises, as shown by said abstract, and the two deeds above mentioned, is good at the date hereof in Robert Forsyth.

Chicago, 14th March, 1870.

WALKER, DEXTER & SMITH.

231 *Exhibit B deposition of Robert C. Wright—Allen Boyer, special examiner.*

Examination of title to lots 4, 5, & 6, in E. L. Sherman's subd'n of lots 4, 5, & 6, in block 1, of Clark's add'n to Chicago.—Last search made Feb'y 15, 1870, by Jones & Sellers.

William R. Arthur to Nathan Corwith. ($15, stamps.) Deed dated Jan'y 4, 1870. Whereas on or about M'ch 30, 1861, by deed of that date, Horatio G. Loomis conveyed to s'd Arthur, in trust for certain purposes in said deed mentioned, lots 4, 5, & 6 of E. L. Sherman's subd'n of lots 4, 5, & 6 in block 1, of Clark's add'n to Chicago, which deed is recorded in the recorder's office of Cook Co. Ill's, in book 210 of deeds, on p'g' 365; and whereas it was provided in said deed that upon the order or request in writing of Rob't Forsyth & Mary E. Forsyth his wife, jointly, s'd Arthur should convey s'd premises to such person or persons as they might designate;

And whereas, on Nov. 3, 1869, s'd Mary E. & Rob't Forsyth served upon s'd Arthur the following notice in writing (here follows in substance this): Chicago, Nov. 3, 1869. Wm. R. Arthur, Dear Sir: Whereas Horatio G. Loomis, by deed dated M'ch 30, 1861, conveyed to
231½ you in trust for certain purposes in said deed mentioned lots 4, 5, & 6 of E. L. Sherman's subd'n of lots 4, 5, & 6 in block 1, of Clark's add'n to the city of Chicago;

And whereas it is provided in substance in said deed that upon an order or request in writing jointly you should convey said premises to such person or persons as "we" might designate;

And whereas it was "our" intention that upon such request "you" should make such conveyance in fee simple absolute, and that event the other trusts in said deed mentioned should be cut off & forever cease;

And whereas a mistake or omission occurred in the drawing of said deed by reason of which "our" authority to compel "you" to execute such deed & cut off said trusts is doubtful;

And whereas "we," with H. G. Loomis, at the Nov'r term of the supe-

rior court of Chicago, A. D. 1869, commenced a suit in chancery against "you" & Leonard E. Forsyth, Rob't Forsyth, Isaac Forsyth, Lydia T. Warrack, James Warrack, Philip A. Warrack, Mary E. Warrack, & Helen M. Warrack for the purpose of correcting & reforming said deed so as to accord with our inteation and direction as stated in said bill:

Now, therefore, whenever and as soon as said court shall decree that said be reformed as prayed, then & in that event we hereby
232 request you to make a good & sufficient conveyance of said premises in fee simple absolute to Nathan Corwith, in pursuance of the terms and provisions of such reformed deed as soon as the same shall be executed in pursuance of the decree of said court, the deed so sought to be reformed being the one recorded in book 210 of deeds, on p'g' 365.

Chicago, Nov. 3d, 1869.

M. E. FORSYTH. [SEAL.]
ROB'T FORSYTH. [SEAL.]

And whereas the decree mentioned in said notice has been rendered, & Benjamin D. Magruder, one of the masters in chancery of said court, has executed a deed in pursuance of said decree & reformatory of said first-mentioned deed, bearing date Nov. 6th, 1869, & "not yet recorded:"

Now, therefore, said Arthur, in pursuance of the deed from Horatio G. Loomis to him, dated M'ch 30, 1861, & of the master's deed, hereinbefore referred to, reformatory of said deed, & of the decree referred to in said master's deed, & of the request in writing above shown from Robert Forsyth & Mary E., his wife, & in consideration of $1, sells, conveys, quitclaims, &c., to s'd Corwith, his heirs, &c.

233 I, Allen Boyer, a special examiner, duly appointed by the circuit court of the United States for the northern district of Illinois, by order of which a certified copy is hereto annexed, to take proof in the before-entitled cause, and report the same to the court, do certify that on the days named in the depositions hereto prefixed, I was attended at the place named in the notice prefixed to the said depositions by counsel and witnesses, as hereinbefore stated, and said witnesses were duly sworn and examined, and the depositions were reduced to writing and read to said witnesses, and by them respectively subscribed and sworn to in my presence.

ALLEN BOYER,
Special Examiner.

Fee, $38, paid by solicitor for John Cochrane.

Dated this sixth day of January, A. D. 1877.

Opened for Mr. Scoville, sol'r for John Cochrane, & filed Apr. 11, '77.
WM. H. BRADLEY, *Clk.*
THOMAS DRUMMOND,
Cr't Judge.

(Endorsed:) Filed August 1st, 1881. Wm. H. Bradley, clerk.

234 The statement of facts and opinion of the court in said entitled caus' are in the words and figures following, to wit:

Statement of facts by the court.

BRANDIES ET AL. v. WALLACE ET AL. } May 15, '79.

As I understand the facts, they are substantially these:

That in 1866 there was a deed in force which had been made on the 30th of March, 1861, to W. R. Arthur, as trustee, of lots 4, 5, and 6 in a certain subdivision on Prairie avenue; that by certain provisions contained in that deed of trust Arthur was required to make conveyance of the property to any one who might be designated by Robert Forsythe and his wife, jointly.

That was the position of the property when, in 1866, a judgment was recovered by these plaintiffs against Robert Forsythe for $9,665. On that judgment an alias execution issued. This property was levied on June, 1870, and sold to the plaintiffs, and a deed executed to them by the sheriff, and under that deed the plaintiffs took possession of the
235 property. In pursuance of the power or right reserved in the deed to Arthur, Robert Forsythe and wife, in November, 1869, directed the trustee, Arthur, to convey the property to Nathan Corwith, and accordingly the trustee executed a deed to Corwith, on the 4th of January, 1870. At the time that this direction was given and the deed executed to Corwith, Forsythe was in debt to Corwith. On the 12th of March, 1870, Corwith conveyed the property to Robert Forsythe. On the 15th of April Robert Forsythe made a loan of John Cochrane, through Wright & Tyrrell, of $15,000, and to secure that loan Forsythe executed a deed of trust to George Scoville, which took effect April 15, 1870. Interest not having been paid on this loan as required, a sale was made by the trustee, under the authority contained in the deed of trust, and on the 17th of April, 1872, Wallace bought the property at this sale. It is said at the time this sale was made the plaintiffs were in possession of the property under a recorded deed. There are various provisions in the deed of trust executed to Arthur which it is claimed show there was an interest in Forsythe which was subject to the lien of the judgment obtained against him by the
236 plaintiffs. In 1868 Robert Forsythe took the benefit of the bankrupt law, and was discharged under the law. In his schedule he did not mention these lots, or that he had any interest therein. Mrs. Forsythe died on or about January 1st, 1870. Forsythe, by himself, or tenants, was in possession of the property until the plaintiffs took possession under the deed made to them by the sheriff. There is a cross-bill filed by Cochrane in consequence of the loan that he made to Forsythe claiming that the property is held by the deed to Scoville as trustee to secure that loan. In the cross-bill it is alleged that in pursuance of an arrangement made between Cochrane and one John Forsythe, Wallace having bid off the property at the trustee's sale, that Cochrane should loan Wallace an additional sum of money to that which he had loaned to Robert Forsythe, and that he should take security from Wallace for the whole amount of the loan including the one to Robert Forsythe, which was accordingly done, and a deed of trust was made by Wallace for the whole amount of the loan, being $17,000. Default having been made by Wallace, a sale took place under the last deed of trust, and Cothrane bid in the property.

237 Deed made to Arthur to hold in trust to permit Mary E. Forsythe, wife of Robert Forsythe to use and occupy and to receive

rents, &c., of the property during her life to her own use and at any and all times upon the order or request in writing of said Mary E. Forsythe and Robert Forsythe jointly, to convey to any one they may designate. If Mary E. Forsythe should die without issue in her husband's lifetime, then to convey to Robert Forsythe for life and to his children, &c.

Opinion of the court.

Circuit court of the U. S., northern dist. of Ill's.

BRANDIES ET AL.
v.
COCHRANE ET AL.

DRUMMOND, J.:

The material question is, whether, when the judgment was recovered by the plaintiffs in this case against Robert Forsythe in 1866, it was a lien upon the lots in controversy so as to warrant the sale which was made under the alias execution in 1870, and under which the plaintiff purchased and obtained a deed from the marshal. That depends
238 very much upon the effect of the deed of March 20, 1861, made to Arthur, as trustee. That deed conveyed the property to Arthur, in trust, to permit Mary E. Forsythe, the wife of Robert Forsythe, to use and occupy it, and to receive the rents and profits of the property during her life, and to her own use; but it also declared that the property at all times was to be so held by Arthur in trust, that upon the order or request in writing of Mary E. Forsythe and her husband jointly he was to convey it to any one they might designate. The deed also declared that if Mary E. Forsythe should die without issue in her husband's lifetime the property was to be conveyed to Robert Forsyth for life, and then to his children, and upon certain contingencies to other parties. Robert Forsythe and his wife, in November, 1869, by an instrument of writing under their hands, directed the trustee to convey the property to Nathan Corwith. The trustee complied with this request, and executed a deed to Corwith on the 4th January, 1870, and it is under this deed that the defendant Cochrane claims. It will be seen from the terms of the deed of trust that Robert Forsythe had only a contingent interest in the property, dependant upon the fact
239 whether the wife should die without issue in her husband's lifetime. It is not stated in the deed of trust what kind of estate was to be conveyed, but it was claimed that the intention of the parties was that on the contingency named of an appointment for the execution of the power by Mary E. Forsythe and her husband that it was to be an estate in fee simple, and accordingly on a bill filed in the superior court of Cook County, alleging a mistake in drawing up the deed of trust, a decree was entered rectifying the error, and declaring that the conveyance was to be an estate in fee simple.

The contingency not having happened upon which Robert Forsythe could claim the estate independent of the joint appointment by himself and his wife, named in the deed of trust, what was the effect of the judgment upon his interest, if he had any in the land? I do not see how, under the circumstances of the case, it could operate as a lien upon the land. He had not a life estate at the time in the land, as was the case in Doe v. Britain, 2 Barnwell—Alderson 93, cited by the plaintiffs;

and the only estate that he at any time has had has been by vir-
240 tue of the execution of the power under the appointment jointly by his wife and himself. It seems to me that any interest which he had in the land at the time the judgment was obtained was liable to be divested by the appointment and execution of the power named in the deed of trust; and therefore I am of the opinion that the judgment, execution, sale, and deed to the plaintiffs did not convey any interest in the land, and it seems clear that if reliance be placed upon the title which Robert Forsythe afterwards acquired by virtue of a deed from Corwith, in March, 1870, it would not be affected by the judgment obtained in 1866, as in 1868. Robert Forsythe became a bankrupt under the law of Congress.

It follows from what has been said that plaintiffs are not entitled to a decree for the property, or to have it relieved from all other claims except their own, and their bill must be dismissed.

Cochrane has filed a cross-bill, and is entitled to a decree.

241 Afterwards to wit, on the first day of August, A. D. 1881, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following to wit:

Appeal bond.

Know all men by these presents that we, Nelson Thomasson and Charles H. Crawford, are held and firmly bound unto John Cochrane, James D. Wallace, Robert Forsythe, and John Forsythe in the full and just sum of five hundred dollars ($500), to be paid to the said John Cochrane, James D. Wallace, Robert Forsythe, and John Forsythe, his attorneys, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals, and dated this first day of August, A. D. 1881.

Whereas lately, to wit, at a term of the United circuit court, held in Chicago, and sitting in & for thenorthern district of Illinois, in a suit depending in said court between Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Craw-
242 ford, and Rosanna Crawford, pl'ffs (original bill), vs. James D. Walker, Robert Forsythe, and John Cochrane, def'ts (O. bill), and John Cochrane, pl'ff, vs. Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, Rosanna Crawford, James D. Wallace, Robert Forsythe, and John Forsythe, defts. (cross-bill), a decree was rendered on the second day of August in the year eighteen hundred & seventy-nine, being July term of that year, against the said Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, Rosanna Crawford, James D. Wallace, Robert Forsythe, and John Forsythe, and in favor of the said John Cochrane, and the said Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, and Rosanna Crawford obtained an allowance of appeal, which allowance appears of record in the clerk's office of the said court, to reverse the decree in the aforesaid suit and a citation directed to the said John Cochrane, James D. Wallace, Robert Forsythe, and John Forsythe citing and admonishing them
243 to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said

Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, & Rosanna Crawford shall prosecute their said appeal to effect & answer all damages and costs if they fail to make their said plea good, then the above obligation to be void; else to remain in full force and virtue.

NELSON THOMASSON. [SEAL.]
CHARLES H. CRAWFORD. [SEAL.]

Approved August 1, 1881.

THOMAS DRUMMOND.

UNITED STATES OF AMERICA,
State of Illinois, Cook County, ss:

Nelson Thomasson, of the State and county aforesaid, being first duly sworn, on oath says that he is worth over and above his just debts the sum of at least ten thousand dollars in real estate in said county and State; that his place of business is 176 Dearborn street, Chicago, and his residence is number 563 East Division, in said city of Chicago.

NELSON THOMASSON.

Sworn to before me this first of August, 1881.

THOMAS DRUMMOND.

(Endorsed:) Filed August 1st, 1881. Wm. H. Bradley, clerk.

244 Afterwards, to wit, on the eighth day of October, A. D. 1881, in the record of the proceedings of said court in chancery in said entitled cause, appears the following entry, to wit:

ADOLPHUS BRANDIES ET AL. *vs.* JAMES D. WALLACE ET AL. } In chancery. Original bill.

and

JOHN COCHRANE *vs.* ADOLPHUS BRANDIES ET AL. } Cross-bill.

Now come Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, and Rosanna Crawford, complainants, in the original bill, by their solicitors, and pray an appeal from the decree of this court entered herein on the second day of August, A. D. 1879, to the Supreme Court of the United States, which said appeal is allowed by the court upon their giving bond herein according to law.

And it is further ordered that this order be now entered upon the records of this court, and stand and take effect nunc pro tunc, as of the first day of August, A. D. 1881. To the entry of which order said John Cochrane, by his solicitor, excepts.

245 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record

of all the proceedings had in said court in said entitled cause wherein Adolphus Brandies et al., are complainants in the original bill, and James D. Wallace et al., are defendants in said original bill, and John Cochrane is complainant in the cross-bill, and said Adolphus Brandies et al., are defendants in said cross-bill, as appears from the records of said court remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in Chicago, this eleventh day of October, A. D. 1881.

[SEAL.] WM. H. BRADLEY, *Clerk.*

246 The United States of America, greeting, to John Cochrane, James D. Wallace, Robert Forsythe, and John Forsythe:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to an appeal of record in the clerk's office of the circuit court of the United States, in and for the northern district of Illinois, wherein Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford, & Rosanna Crawford are appellants and you are appellees, to show cause, if any there be, why a certain decree rendered against the said appellants and the said James D. Wallace, Robert Forsythe, & John Forsythe, & in favor of said John Cochrane, should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Drummond, judge of the United
247 States circuit court for the northern district of Illinois, this first day of August, A. D. 1881.

THOMAS DRUMMOND.

A. D. Baldwin, of Cook County, Illinois, being first duly sworn, deposes and says that he served the within citation upon Robert Forsythe, by giving him, personally, a true copy thereof, on the 18th day of August, 1881; upon John Forsythe and James D. Wallace, by giving them each, personally, a true copy thereof, on the 8th day of September, 1881, and upon John Cochrane, by giving a true copy thereof, personally, to George Scoville, the solicitor of record of said John Cochrane in the cause in said citation mentioned, on the first day of September, 1881. Service of each of said parties, as aforesaid, having been made in Chicago, Cook County, Illinois.

A. D. BALDWIN.

Subscribed and sworn to before me this 11th day of October, 1881.
WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 1043. Adolphus Brandies, Wm. M. Crawford, Chas. H. Crawford, Arthur S. Crawford, Ida E. Crawford, and Rosanna Crawford, appellants, vs. John Cochrane, James D. Wallace, Robert Forsythe, and John Forsythe. N. Illinois C. C. U. S. Filed October 13, 1881.

IN THE

Supreme Court of the United States,

(No. 1043.)

OCTOBER TERM, A. D. 1881.

ADOLPHUS BRANDIES ET AL., *Appellants,*

vs.

JOHN COCHRANE ET AL., *Appellees.*

Appeal from the Circuit Court of the United States, Northern District of Illinois.

In Equity.

BRIEF IN OPPOSITION TO MOTION TO DISMISS, AND COPY OF COUNTER MOTION, AND EVIDENCE IN SUPPORT THEREOF.

JOHN S. MONK,

Solicitor for Appellants.

CHICAGO:
HORACE O'DONOGHUE, LEGAL PRINTER, PARKER BUILDING, 95-97 WASHINGTON STREET.
1882.

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Solicitor for Appellants.

CHICAGO:
HORACE O'DONOGHUE, LEGAL PRINTER, PARKER BUILDING, 95-97 WASHINGTON STREET.
1882.

Copy of Motion for Certiorari or Amendment of Record Here.

In the Supreme Court of the United States.

ADOLPHUS BRANDIES, ET AL., *Appellants*, v. JOHN COCHRANE, ET AL., *Appellees*. } *Appeal from the United States Circuit Court, Northern District of Illinois.*

And now, on this 27th day of February, A. D. 1882, come the appellants, by John S. Monk, their solicitor, and suggest to the court here, that in the record in this cause, and in the transcript thereof returned from said Circuit Court, there are certain defects, that is to say: neither the said record nor the transcript recites, in express terms, that an appeal was prayed on the first day of August, 1881, when the appeal bond was approved and citation issued.

And the appellants represent and show, that a motion to dismiss the appeal has been filed in said cause by John Cochrane, appellee, one ground of said motion being that the *nunc pro tunc* order relating to said appeal, entered October 8, 1881, recites that the same was prayed and allowed on that day; whereas, in truth and in fact, said appeal was prayed and allowed on the first day of August, 1881, and within two years after the rendition of the decree appealed from.

Appellants further show, that since the filing of said motion, the record of said order has been amended in the court below by the insertion therein of an express recital that said appeal was prayed August 1, 1881, as appears from the certified copy of the amendatory order filed herewith in this court.

Wherefore appellants pray that a writ of *certiorari* may be awarded, directed to the clerk of said Circuit Court, to send up a transcript of the record of said amendatory order, and that the certified copy thereof on file in this court be taken and regarded as a return to such writ; or that on the said copy, and the affidavits on file, and without awarding a *certiorari*, the record be amended here so as to recite the taking and the allowance of said appeal August 1, 1881. And in support of this motion, appellants offer the affidavits filed herewith, and a certified copy of the amendatory order aforesaid, and the affidavits upon which the same was founded, also filed herewith.

JOHN S. MONK,
Solicitor for Appellants.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS. } ss.

I, John S. Monk, being first duly sworn, depose and say that I am the solicitor for appellants in the above-entitled cause, and that on the 20th day of February, A. D. 1882, by an amendatory order, dated on that day, the record of the *nunc pro tunc* order relating to the appeal herein, entered on the records of said Circuit Court, October 8, 1881, was amended by inserting after the words, "as of the first day of August, A. D. 1881," the following words, "the said appeal having been prayed on the day last mentioned, and the entry of that fact having been omitted by the clerk."

JOHN. S. MONK.

Sworn to and subscribed before me this 22d day of February, A. D. 1882, as witness my hand and official seal, at my office in Chicago, in Northern District of Illinois, the day and date last aforesaid.

[SEAL.] WM. H. BRADLEY,
Clerk of the Circuit Court of the United States, for the Northern District of Illinois.

COPY OF AFFIDAVITS OF BALDWIN AND COE IN SUPREME COURT.

United States Supreme Court,
October Term, A. D. 1881.

ADOLPHUS BRANDIES *et al.*, *Appellants*,	)	*Appeal from the United States Circuit Court, Northern District of Illinois.*
v.		
JOHN COCHRAN, *et al.*, *Appellees.*	)	*In Equity.*

STATE OF ILLINOIS, }
COOK COUNTY. } ss.

A. Dwight Baldwin and George B. Coe, being duly sworn, upon oath, each for himself, deposes and says, that on the first day of August, 1881, in behalf of Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford and Rosanna Crawford, they appeared before his Honor Thomas Drummond, Circuit Judge of United States Circuit Court for the Northern District of Illinois, and prayed for an appeal, which was then allowed; and that an appeal bond was thereupon tendered and approved by said judge, and a citation issued in said cause; and that afterwards, to wit, on or about October 8, 1881, having made a showing of the above mentioned facts to the said judge, he declared himself satisfied that an appeal was prayed and allowed on said first day of August, 1881, and informed these affiants that a *nunc pro tunc* order would be entered showing the facts so to be.

And the said A. Dwight Baldwin further says, that he heard his Honor inform the clerk that the appeal had been prayed and allowed as aforesaid, and instruct said clerk so to enter it upon the record of said court, *nunc pro tunc*.

A. DWIGHT BALDWIN,
GEO. B. COE.

Subscribed and sworn to before me, this 11th day of February, 1881.

[SEAL.] FRANCKE C. ELLIOTT,

Notary Public in and for Cook County, in the State of Illinois.

COPIES OF CERTIFIED COPY OF AFFIDAVITS FILED IN CIRCUIT COURT, AND ORDER BASED THEREON.

UNITED STATES OF AMERICA, }
NORTHERN DISTRICT OF ILLINOIS, } ss.

In the United States Circuit Court, }
Northern District of Illinois. }

ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, CHARLES H. CRAWFORD, ARTHUR S. CRAWFORD, IDA E. CRAWFORD AND ROSANNA CRAWFORD
vs.
ROBERT FORSYTHE, JAMES D. WALLACE AND JOHN COCHRANE.
} *Bill.* Gen. No 10367.

JOHN COCHRANE
vs.
ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, CHARLES H. CRAWFORD, ARTHUR S. CRAWFORD, IDA E. CRAWFORD, ROSANNA CRAWFORD, ROBERT FORSYTHE, JAMES D. WALLACE AND JOHN FORSYTHE.
} *Cross Bill.*

STATE OF ILLINOIS, }
COOK COUNTY, } ss.

A. Dwight Baldwin, being first duly sworn, upon oath said that he was present in said court October 8, 1881, at the time the Hon. Thomas Drummond, Judge of said court, directed the clerk of said court to make the entry of the *nunc pro tunc* order in relation to the appeal

in said cause; and this affiant says that such order was given orally, and that he heard the said judge state to the clerk that he was satisfied that the appeal had been prayed and allowed on the first day of August, 1881, and instructed the said clerk to enter a *nunc pro tunc* order showing these facts.

A. DWIGHT BALDWIN.

Subscribed and sworn to before me this 10th day of February, 1881.

[NOTARIAL SEAL] FRANCKE C. ELLIOTT,
Notary Public.

STATE OF ILLINOIS, }
COOK COUNTY, } ss.

A. Dwight Baldwin and George B. Coe, being first duly sworn, upon oath say, each for himself, that on the 1st day of August, A. D. 1881, they appeared before his Honor Thomas Drummond, Circuit Judge for the circuit in which said court is held, and prayed an appeal in the above entitled cause; and that on or about the 8th day of October, 1881, having made a showing to his Honor of the facts, and that no entry was made of such appeal, he informed these affiants that he was convinced that the appeal was taken at that time, and that a *nunc pro tunc* order should be entered showing the facts so to be.

A. DWIGHT BALDWIN,
GEO. B. COE.

Subscribed and sworn to before me this 10th day of February, 1882.

[NOTARIAL SEAL] FRANCKE C. ELLIOTT,
Notary Public.

(Endorsed):
Filed Feb. 20, 1882.
WM. H. BRADLEY, *Clerk.*

UNITED STATES CIRCUIT COURT,
NORTHERN DISTRICT OF ILLINOIS,

MONDAY, Feb. 20, A. D. 1882.

Present: Hon. THOMAS DRUMMOND, Circuit Judge.

ADOLPHUS BRANDIES ET AL.	*In Chancery.*
vs.	
JAMES D. WALLACE ET AL., AND	*Original Bill.*
JOHN COCHRANE	*Cross Bill.*
vs.	
ADOLPHUS BRANDIES ET AL.	Gen. No. 10367]

Now, at this day came Adolphus Brandies, William W. Crawford, Charles H. Crawford, Arthur S. Crawford, Ida E. Crawford and Rosanna Crawford, plaintiffs in the original bill, by their solicitor, and John Cochrane, by his solicitor, and on motion of the solicitor for the said plaintiffs in the said original bill, and on affidavits filed, it is ordered that the *nunc pro tunc* order of October 8, 1881, relating to the appeal in this case, be amended by inserting after the words, "as of the 1st day of August, A. D. 1881," the following words: "The said appeal having been prayed on the day last mentioned, and the entry of that fact having been omitted by the clerk."

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, Clerk of the Circuit Court of the United States for said Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the affidavits of A. Dwight Baldwin and George B. Coe, filed in said court on the 20th day of February, and also a true and correct copy of the order entered of record in said court on the 20th day of February, A. D. 1882, in the cause wherein Adolphus Brandies et al. are the complainants, and James D. Wallace et al. are the defendants, as the same appears from the originals thereof, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 21st day of February, A. D. 1882.

WM. H. BRADLEY,
Clerk.

NOTE—Exception of counsel for Cochrane to this order taken at the time, is to be considered as though formally noted.

IN THE

Supreme Court of the United States,

(No. 1043.)

OCTOBER TERM, A. D. 1881.

ADOLPHUS BRANDIES ET AL., *Appellants*,
vs.
JOHN COCHRANE ET AL., *Appellees*.

Appeal from the Circuit Court of the United States, Northern District of Illinois.
In Equity.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

STATEMENT OF FACTS.

A prayer for an appeal and its allowance were noted at the foot of the decree at the time of its rendition, which was on the second day of August, 1879. No bond was filed or approved, nor was any citation issued on that appeal. Within two years after the rendition of the decree, to wit, August 1, 1881, a new appeal was prayed and allowed, an appeal bond was filed and approved, and at the same time a citation issued, which was served in season for the present term of this court. Through the neglect of the clerk, no entry of the new appeal was made at the time; but on October 8, 1881, the order of August 1, 1881, was entered *nunc pro tunc*. The order as originally entered, being a little ambiguous, it

was, on the twentieth day of February, 1882, so amended as to show in express terms that an appeal was prayed August 1, 1881, a copy of which order as amended is now on file in this court.

The motion to dismiss the appeal should be overruled, because :

1. An appeal was in fact prayed and allowed August 1, 1881. The manifest object and intent of the order as entered October 8, 1881, was not to grant a new appeal and give it a retroactive effect, but to supply record evidence of the one allowed August 1, 1881. The amendment of February 20, 1882, though proper, was unnecessary.

2. The action of the Circuit Judge on August 1, 1881, in accepting the security and issuing the citations, was in legal effect the allowance of a new appeal, and no further evidence of such allowance by record or otherwise is necessary.

I.

An amendment of the record may be made by the court that rendered the judgment and retains possession of the record, though an appeal is pending. By the appeal the court loses jurisdiction of the case, but not of the record. *Rew* v. *Barker*, 2 Cow. 408, and note to the same case in 14 Am. Dec. 515, citing a large number of authorities. Any evidence which satisfies the court what its real order was, is sufficient. In *Doe* v. *Litherby*, 40 McL. 442, and *Matheson's Admr.* v. *Grant's Admr.*, 2 Howard (U. S.), 263, the entry was ordered on motion supported by affidavit. And in *Wyman* v. *Buckstaff*, 24 Wis. 477, and *Clark* v. *Lamb*, 8 Pick. 415, on the personal recollection of the judge.

The amendment, if not proper in the court below, may be made here. *Woodward* v. *Brown*, 13 Peters, 1; *Hudgins* v. *Kemp*, 18 Howard, U. S. S. C. 530; *Peas* v. *Morgan*, 7 Johns. 468; *Shaw* v. *Railroad*, 101 U. S. 557; Sec. 1005, Rev. Statutes.

But no amendment was or is necessary. The order, as originally entered, was sufficiently plain. The difference between it and the one under consideration in 3 Otto, is the difference between an order that an appeal shall relate back to a time before it was in fact taken, and an order for a *nunc pro tunc* entry of an appeal previously granted. The order in this case, as originally entered, is not that the appeal be allowed as of a prior date, but that the appeal allowed August 1, 1881, "be now (October 8, 1881) entered *nunc pro tunc*," as of that date. Its language was intended to apply to what was done August 1, 1881, and not to what was done on the date of actual entry. If the direction to enter as of the prior date were at the beginning instead of at the close of the order, the meaning would have been perfectly clear; it is reasonably so as it is. Whatever doubt might otherwise exist on this point is removed by implication from the balance of the record. The appellants appeared before the Circuit Judge on the 1st of August, 1881, gave the required security and procured the issuance of a citation. In the light of these facts, it is evident that something transpired on that day which the judge regarded as a prayer for, and an allowance of, an appeal, and intended, by the order entered October 8, that the fact should so appear of record.

II.

The allowance of the appeal, though said to be essential, need not appear of record.

Phillips' Prac. (*U. S. S. C.*) 49, *and cases there cited.*

The acceptance of the security, followed by the signing of the citation, is, in legal effect, the allowance of an appeal.

Sage v. *Railroad Co.*, 96 U. S. 712.
National Bank v. *Omaha*, Ib. 737.

In *Sage* v. *Railroad Company*, *supra*, the decree appealed from was entered August 31, 1877, and on the same day, in open court, the defendants prayed an appeal. They also asked that security for a supersedeas might be accepted and approved. The Circuit Court allowed the appeal, but refused the *supersedeas*. On or about September 15, 1877, the defendants presented to Mr. Justice HUNT, of this court, a justice assigned to a different circuit from that whence the appeal came, a *petition setting forth the taking of an appeal by them, in open court*, from the order of August 31st, and its *allowance*, and stating further, that "no supersedeas bond was given or approved." They thereupon tendered a bond, which they asked the judge to approve and allow to operate as a supersedeas, which was done. A motion to vacate the supersedeas was overruled by this court. WAITE, C. J., delivering the opinion of this court, says :

> The statute makes no provision in terms for the form of an appeal (*Rev. Statutes, sec. 692*), but as there can be no appeal without the taking of security, either for costs or costs and damages, and this is to be done by the court, or a judge or justice, the acceptance of the security, if followed when necessary by the signing of a citation, is, in legal effect, the allowance of an appeal. * * * * * Whenever, therefore, security for an appeal is accepted during the term, an appeal is allowed. If the security is taken out of court, and after the term, a citation should be issued to bring in the parties, unless they voluntarily appear ; for, until the security has been accepted, the allowance of the appeal cannot be said to have been perfected. * * * * * * When, therefore, Mr. Justice HUNT accepted the security in this case, he allowed an appeal, which, by reason of the form of the security, was to operate as a *supersedeas*. * * * * It is true *that the bond* accepted in this case *recites an allowance of an appeal in open court ;* but this is mere surplusage, and does not affect either the appeal or the validity of the bond.

This case was followed in *National Bank* v. *Omaha*, *supra*, in which it was held, that even though an appeal is prayed in open court, if the security is not taken until after the term, a citation is necessary; "for until the security has been accepted, the allowance of the appeal can not be said to be perfected."

These cases effectually dispose of the argument that the essential parts of an appeal are the prayer for it and the order of allowance; and establish that the one essential thing is the taking of security, followed, when necessary, by the signing of a citation. And if a recital in a petition for a supersedeas, and in the bond tendered and accepted, that the appeal was taken and allowed in open court, may be treated as surplusage, and as not affecting the validity either of the bond or the appeal, surely the recital in the citation, that the appeal "appeared of record," may be so treated. In *Sage* v. *Railroad Co.*, both the counsel and the justice allowing the supersedeas supposed that it was granted in an appeal already pending; but that did not alter its legal effect. No more ought a similar mistake to affect the validity either of the new appeal or the citation in this case. The recital in the latter, that the appeal appeared of record, was clearly surplusage. It was unnecessary to recite when the appeal was taken, or whether it appeared of record or not. It was sufficient for the citation to advise appellees that the appeal was being prosecuted, and of the time for their appearance. Its office was to bring them into court; and having done that, an appearance for the purpose of informing the court that they are not here, should meet with no favor. To deprive a party of a hearing in the court of last resort, something more serious than the misrecital of a fact not necessary to be recited at all, should be required.

Respectfully submitted,

JOHN S. MONK,

Solicitor for Appellants.

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1881.

ADOLPHUS BRANDIES, ET AL., *Appellants,*	vs.	Appeal from the United States Circuit Court, Northern District of Illinois, In Equity.
JOHN COCHRANE, ET AL., *Appellees.*		

No. 1013

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

EDWIN F. BAYLEY,

SOLICITOR FOR JOHN COCHRANE.

BEACH, BARNARD & CO., PRINTERS, 146 RANDOLPH ST., CHICAGO.

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1881.

ADOLPHUS BRANDIES, ET AL., *Appellants*,
No. 1043. *vs.*
JOHN COCHRANE, ET AL., *Appellees*.

Appeal from the United States Circuit Court, Northern District of Illinois.
In Equity.

MOTION TO DISMISS APPEAL.

And now comes the said John Cochrane (whose special appearance has been entered herein for the purpose of making this motion), by Edwin F. Bayley, his solicitor, and moves the court to dismiss said appeal for want of jurisdiction, and for grounds of such motion shows:

First: That this court has no jurisdiction of said cause by virtue of the first appeal, which was prayed and allowed in the court below on August second, A. D. 1879, because the transcript of the record was not filed here during the next ensuing term of this court, nor until October thirteenth, A. D. 1881.

Second: That the final decree in said cause was entered on August second, A. D. 1879, and no appeal was taken after said August second, A. D. 1879, and within two years therefrom.

Third: That the prayer for a second appeal, made on the eighth day of October, A. D. 1881, and the order of said Circuit court on the same day allowing such second appeal, do not constitute a valid appeal, and did not give this court jurisdiction of said cause, because said action was taken more than two years after the entry of said final decree; nor did the additional order of said October eighth, A. D. 1881, directing that said order then entered, allowing such second appeal, should "stand and take "effect *nunc pro tunc* as of the first day of August, A. D. "1881," have any force or effect whatever, because in derogation of the statute limiting the time for appeals, and not within the power of said Circuit court; moreover, no citation was issued upon such second appeal.

Wherefore this appellee says that this Honorable Court has acquired no jurisdiction of this cause, and moves that said appeal be dismissed.

EDWIN F. BAYLEY,
Solr. for John Cochrane.

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1881.

ADOLPHUS BRANDIES, ET AL., *Appellants*,
No. 1043. *vs.*
JOHN COCHRANE, ET AL., *Appellees.*

Appeal from the United States Circuit Court, Northern District of Illinois. In Equity.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

STATEMENT OF FACTS.

The final decree from which an appeal is sought was entered on the second day of August, A. D. 1879, (Rec., 122). On the same day an appeal to this court was prayed by complainants in the original bill below, appellants here, and allowed by the Circuit court. (Rec., 127.) Nothing further was done toward prosecuting said appeal until August 1st, A. D. 1881, when an appeal bond, signed by one of the appellants, was filed in the office of the clerk of said Circuit court, and approved by the circuit judge. (Rec., 241). A citation was issued on the same day, returnable to the second Monday of October, 1881. No appeal was prayed for or allowed on said 1st day of August, 1881; nor was any order of any kind relating to an appeal entered in the case after August 2d,

A. D. 1879, and prior to October 8th, A. D. 1881. On the eighth day of October, A. D. 1881, appellants appeared in the court below, by their counsel, and prayed a second appeal from said decree, and thereupon an order was entered by said Circuit court, allowing such appeal, and further directing that the order *then* entered "stand and "take effect *nunc pro tunc* as of the first day of August, "A. D. 1881." (Rec., 244). The transcript of the record was filed in this court on the 13th day of October, A. D. 1881.

This appellee, John Cochrane, has entered a special appearance herein, and filed a motion to dismiss the appeal for want of jurisdiction.

Points and Authorities.

I.

This court has no jurisdiction by virtue of the first appeal, prayed and allowed on August 2d, A. D. 1879. That appeal is void because not perfected by filing a transcript of the record at the next term of this court. Had appellants filed the record here during the October term, 1879, instead of in October, 1881, this court would have acquired jurisdiction of the cause. Not having done so, their first appeal lost its vitality.

Edmonson v. *Bloomshire*, 7 Wallace, 306.
Castro v. *United States*, 3 Wallace, 46.
United States v. *Gomez*, 1 Wallace, 690.
Mesa v. *United States*, 2 Black., 721.
United States v. *Curry*, 6 Howard, 106.
Mussina v. *Cavazos*, 6 Wallace, 355.
Villalobos v. *United States*, 6 Howard, 81.
Steamer Virginia v. *West*, 19 Howard, 182.

The filing of the appeal bond on August 1st, 1881, did not revive said appeal. That appeal was complete on August 2d, 1879. As was said by this court in *Edmonson* v. *Bloomshire*, *supra*, wherein this precise question was raised: "The prayer for the appeal and the order allowing it, constituted a valid appeal. The bond was "not essential to it. It could have been given here, and "cases have been brought here where no bond was approved by the court below, and the court has permitted "appellant to give bond in this court. * * * It "is not, therefore, an indispensable part of an appeal that "a bond should be filed."

Ex parte Milwaukee R. R. Co., 5 Wallace, 188.
Seymour v. *Freer*, 5 Wallace, 822.
Brobst v. *Brobst*, 2 Wallace, 96.
The Dos Hermanos, 10 Wheat., 306.
Bigler v. *Waller*, 12 Wallace, 142.

Nor can the citation, issued August 1st, 1881, be held to have revived said appeal. The citation, as well as the bond, expressly referred to the first appeal, which was the *only* appeal then "of record," in the case. That appeal was not *dormant*, but was long since *dead*. As said by this court in a similar case: "The citation subsequently "issued was consequently without avail, for there was no "subsisting appeal." *Castro* v. *United States*, 3 Wall., 46.

II.

The appeal sought to be taken on October 8th, A. D. 1881, and upon which this record is, in fact, brought to this court, is not a valid appeal, because not taken within two years from the date of entry of the final decree below.

U. S. Rev. Stat. §§ 1008, 1012.

The final decree was entered August 2d, A. D. 1879, and as this appeal was not prayed until October 8th, A. D., 1881, the period of two years, to which Congress has seen fit to limit the right of appeal, had elapsed more than two months before this appeal was prayed. But an attempt was made on said October 8th, 1881, to expunge from the calendar the months which had then elapsed since the right of appeal had expired *by an order of court*, and to the order allowing this appeal was added the direction that such order *then* entered "stand and take effect "*nunc pro tunc* as of the first day of August, A. D. 1881."

As the power of the court to allow an appeal is conferred and strictly regulated by statute, (Rev. Stat. § 692, *Castro* v. *United States*, 3 Wall., 46), and as the exercise of that power is limited by the statute to a period of two years after entry of final decree, and as that period expired on the 1st day of August, 1881, the court lost, upon that day, all jurisdiction of the case, so far as concerned an appeal; and the attempt to regain its lost jurisdiction by the entry of an order on the 8th day of October, 1881, as of the 1st day of August preceding, was simply nugatory. If a court can, two months after it has lost jurisdiction of a case, regain jurisdiction by a mere fiction, why not after two years? or after ten years? or after any length of time? If this power be conceded, the act of Congress limiting the jurisdiction of the court is completely nullified. But we have seen that the court had no power except that conferred by statute, and that its power was thereby regulated and limited. It follows that the order of October 8th, 1881, is a nullity.

In *Sage* v. *Central R. R. Co.*, 3 Otto, 412, this court has passed upon a similar order, and held it ineffectual for the purpose of a *supersedeas*, and it was there said: "The

"court can no more give effect to a *supersedeas* by order-
"ing that the appeal shall relate back to a time within
"the sixty days *than it can to an appeal taken after the*
"*expiration of two years by dating it back to a time*
"*within the limitation.*"

Garrison v. *Cass County*, 5 Wall., 823.
Rubber Co. v. *Goodyear*, 6 Wall., 153.
Fishmonger's Company v. *Robertson*, 3 Man., Gr. & S., 974.

This case does not fall within the class of cases mentioned in *Sage* v. *Central R. R. Co. supra*, and *Mitchell* v. *Overman*, 103 U. S. 62., as forming a possible exception to the general rules; namely, those cases in which the delay in entering an order in proper time was the act of the court and not of the parties. If an appeal had actually been prayed on the 1st day of August, 1881, but the record, through no fault of appellants, had failed to show such prayer, then it might perhaps be held that the subsequent entry of an order reciting the facts, and making the record to correspond with the facts, was a proper proceeding; and, in such case, the approval of the appeal bond and the issuance of a citation on the first day of August, 1881, might be held, under the authority of *Sage* v. *Central R. R. Co.*, 96 U. S., 712, to constitute an allowance of the appeal so actually prayed by the parties. But no such facts exist in *this* case. Nothing was done towards taking a new appeal on the first day of August, 1881. Appellants were then content with their first appeal, taken two years before, but wholly neglected till then, and accordingly filed an appeal bond and had a citation issued thereon, under the assumption that such appeal was then valid. Not until October 8th, 1881, did appellants see fit to pray a second appeal; and, as if to set at rest any doubt

as to when such second appeal was actually prayed, the court in its order allowing the appeal, expressly states that such appeal was prayed on October 8, 1881, (Rec., 244.) As there could be no allowance of an appeal until it was prayed, the approval of the appeal bond and issuing of the citation on August 1st, 1881, were ineffectual for any purpose.

Moreover, no citation was issued upon the second appeal; only one citation issued, and that expressly referred to the first appeal, and could have referred to no other, since it was issued and served long before the second appeal was thought of.

In the case of *United States* v. *Curry*, *supra*, Chief Justice TANEY, replying to the objection that the rules governing appeals were technical, said: "This court does not "feel itself authorized to treat the directions of an act of con- "gress as it might treat a technical difficulty growing out "of ancient rules of the common law. The power to hear "and determine a case like this is conferred upon the court "by acts of congress, and the same authority which gives "the jurisdiction has pointed out the manner in which the "case shall be brought before us; and we have no power "to dispense with any of these provisions nor to change "or modify them."

Twenty years later this language was referred to and approved in *Edmonson* v. *Bloomshire*, *supra*, and the court there added: "It is better, if the rule is deemed unwise "or inconvenient, to resort to the legislature for its cor- "rection, than that the court should depart from its settled "course of action for a quarter of a century."

Applying the rules governing appeals to the case at bar, we find that no valid appeal has brought the case to this court. The first appeal, though valid when taken, became void through appellant's neglect. No other ap-

peal was taken within the two years allowed therefor. The attempt to take a second appeal after the two years had expired was wholly nugatory. And, since the jurisdiction of this court depends upon the regularity of the appeal, it follows that this appeal must be dismissed.

Respectfully submitted.

EDWIN F. BAYLEY,

Solr. for John Cochrane, Appellee.

(over)

SUPPLEMENT.

Since being served with a copy of the foregoing motion and brief, appellants' counsel has prevailed upon the court below to add a *postscript* to the "*nunc pro tunc* order" of October 8, 1881!

This action was taken on February 20, 1882, several months after the record had been transferred to this court, and some weeks after the motion to dismiss the appeal, based upon that record, had been filed here! Yet, as I am informed, appellants' counsel will endeavor to present to this court a copy of this recent so-called "amendment," in connection with his brief opposing this motion.

But this so-called "amendment" which the Circuit court has so recently entered upon *its* records, whatever it may be, cannot effect the decision of this motion, for the following reasons:

First. Because it is not a part of the record here. The transcript filed here on October 13th, 1881, is the record before this court. This has not been enlarged, or changed, and cannot be, without leave of this court. (Rule 14.) To this record only will this court refer in deciding this motion.

Davis v. *Packard*, 6 Pet., 47.
Hudgins v. *Kemp*, 18 How., 534.
Balt. & Pot. R. R. Co. v. *Trustees, &c.*, 1 Otto, 127.

Nor can such "amendment" be made a part of the record here to affect this motion.

Williams v. *Norris*, 12 Wheat., 120.
Suydam v. *Williamson*, 20 How., 440.
United States v. *Young*, 4 Otto, 528.

Second. Even were the "amendment" of Feby. 20th, 1882, a part of this record, which it is not, still it would not render this appeal valid. It would be, at best, but an amendment of a void order, and likewise void. It would but show that the circuit judge had a second time assumed to take action in the case after his authority to act had ceased. His power relative to an appeal had terminated more than six months before. Besides, the record had long since been transferred to this court. There was no such case pending in said Circuit court as described in the so-called "amendment," and whatever may have been then done in that court is a nullity.

Geneves v. *Bonnemer*, 7 Wall., 564.
Avendano v. *Gay*, 8 Wall., 396.
Virginia v. *Reeves*, 100 U. S. 313.

Moreover, the so called "amendment" is inconsistent with the order to which it is sought to be appended. The order of October 8th expressly states that the appeal was prayed *then*. The "amendment" *adds* that "said appeal" was prayed on August first! Both statements cannot be true. And, were this recent "amendment" a part of this record, or entitled to consideration here, we should still be left to choose between these inconsistent statements, and decide from other facts in the record which of the two should be taken as true.

Nor would it appear, even by the addition of such

"amendment," that appellants had *taken an appeal* and that such appeal had been *allowed* within the time prescribed therefor, as these terms have been defined by this court.

Barrel v. *Transportation Co.*, 3 Wall., 424.

It is true that amendments may sometimes be made, even after the expiration of a term. But I am not aware that it has ever been held that a court can, *after the expiration of the period fixed by law for taking an appeal*, change its record so as to make it show an appeal till then undisclosed.

In the case at bar the power of the Circuit court relative to an appeal terminated on August first, 1881. Thereupon property rights under the decree became vested upon the record as it then stood; and no subsequent attempt to change such record could affect such rights. Were it otherwise, the record of a court could never be a muniment of title, and the limitation established by congress would be a nullity.

EDWIN F. BAYLEY,
Sol'r for John Cochrane.

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1881.

ADOLPHUS BRANDIES, ET AL.,
Appellants,
vs.
JOHN COCHRANE, ET AL.,
Appellees.

No. 1013.

Appeal from
U. S. Circuit Court,
for
Northern District of
Illinois.

OBJECTION TO ALLOWANCE OF COUNTER MOTION FOR
DISMISSAL.

EDWIN F. BAYLEY,
SOLICITOR FOR JOHN COCHRANE.

BRACE, BARNARD & CO., PRINTERS, 111 RANDOLPH ST., CHICAGO.

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1881.

ADOLPHUS BRANDIES, ET AL., *Appellants*,
No. 1043. *vs.*
JOHN COCHRANE, ET AL., *Appellees*

Appeal from U. S. Circuit Court, Northern District of Illinois.

POINTS IN OPPOSITION TO MOTION FOR CERTIORARI.

Since the filing of the motion to dismiss the appeal for want of jurisdiction, and brief in support thereof, appellants have entered a cross motion for a writ of *certiorari* to bring up a transcript of an "amendatory order" entered in the court below on February 20th, 1882, purporting to be an amendment of the so-called "*nunc pro tunc* order" of the Circuit court, entered more than two years after final decree therein. It being claimed that such "amendatory order" shows facts affecting the jurisdiction of this court not shown by the record here.

I respectfully submit the following objections to the allowance of said cross motion.

1. The "amendatory order" set forth in said cross motion is a nullity, being but an amendment of a void order, which was entered after the right of the court below to make any order relative to an appeal had terminated by limitation.

2. The "amendatory order" should not be made a part of this record to affect the motion to dismiss the appeal, because made in the court below after the transcript of the record had been filed in this court, and the motion to dismiss the appeal had been entered here.

3. To allow an order of the Circuit court, made more than two years after the entry of final decree, to establish an appeal not shown upon the record of proceedings had during the two years, would be practically to nullify the statute regulating appeals, and to leave parties who may have acquired property rights upon the faith of such record to the chances of subsequent changes founded upon affidavits. In this case the two years prescribed for an appeal expired August 1st, 1881. At their termination the record and files of the Circuit court showed nothing relating to an appeal beyond the fact that an appeal had been taken August 2d, 1879, and an appeal bond had been filed thereon. That appeal had not been prosecuted, and was of no effect. There was no valid appeal shown upon the record. Thereupon the limiting statute became a rule of property, and the rights acquired under the decree became settled. Until then the title to the real estate had been subject to the contingency of further question upon appeal, but thereafter it was absolute. To hold that titles

which may have been purchased upon the strength of such record, and of the governing statute, can be effected by subsequent "*nunc pro tunc* orders" and "amendments" thereof, made for the purpose of establishing a newly discovered appeal, would be to place the authority of the Circuit court above that of the statute which regulates its action.

EDWIN F. BAYLEY,

Solicitor for John Cochrane.

IN THE

SUPREME COURT of the UNITED STATES.

No. 92.

ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, CHARLES H. CRAWFORD, ARTHUR S. CRAWFORD, IDA E. CRAWFORD AND ROSANNA CRAWFORD,

Appellants,

vs.

JOHN COCHRANE, JAMES D. WALLACE, ROBERT FORSYTHE AND JOHN FORSYTHE,

Appellees.

Appeal from the Circuit Court of the United States, Northern District of Illinois.

BRIEF AND ARGUMENT.

JOHN S. MONK,

For Appellants.

CHICAGO:
HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 95-97 WASHINGTON ST.
1884.

IN THE

SUPREME COURT OF THE UNITED STATES.

(No. 92.)

ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD, CHARLES H. CRAWFORD, ARTHUR S. CRAWFORD, IDA E. CRAWFORD AND ROSANNA CRAWFORD,
Appellants,

vs.

JOHN COCHRANE, JAMES D. WALLACE, ROBERT FORSYTHE AND JOHN FORSYTHE,
Appellees.

Appeal from the Circuit Court of the United States, Northern District of Illinois.

BRIEF AND ARGUMENT.

This was a suit to quiet title in appellants to lots 4, 5 and 6, of E. L. Sherman's subdivision of lots 4, 5 and 6, in block 1, in Clark's Addition to Chicago. On May 27, 1872, Adolphus Brandies *et al.* filed their bill against James Wallace and Robert Forsythe. On July 13, 1876, John Cochrane, on his own petition, became a party defendant, and filed his answer on the same day; and, on October 14, 1876, he filed his cross-bill, making all the parties to the original bill, and also one John Forsythe, defendants thereto. In this cross-bill he asserted ownership of the property in himself, and asked that the title thereto be quieted in him. The cause was heard

upon bill and cross-bill, answers to bill and cross-bill, replications thereto, and the evidence. A decree having been entered, August 2, 1879, dismissing the original bill for want of equity, and granting the relief prayed for by Cochrane in his cross-bill, the complainants in the original bill appeal.

Both parties claim title under Robert Forsythe.

FACTS REGARDING THE TITLE OF APPELLANTS.

In 1865, Adolphus Brandies and William Crawford, partners, under the firm name of Brandies & Crawford, were engaged in manufacturing flour, at Madison, Indiana. At the same time, Robert Forsythe and one George T. Brown, partners under the firm name of Forsythe & Brown, were commission merchants in Chicago.

On September 30th, 1865 they received from Brandies & Crawford, ten thousand dollars to be used for the purchase and shipment of wheat to the last named firm. It would seem (*Crawford's testimony, page 61 Record.*) that the wheat was actually purchased and afterwards converted by Forsythe & Brown. At all events they converted either the money or the wheat, no wheat ever having been shipped to Brandies & Crawford on this order. It appears that on previous transactions, a small balance was due Forsythe & Brown, so that on their failure to account for the ten thousand dollars, or ship the wheat purchased therewith, there was due from them to Brandies & Crawford, nine thousand six hundred and sixty-five dollars, for which sum they recovered judgment against Forsythe & Brown, at the March Term, 1866, of the Circuit Court for the Northern District of Illinois.

On this judgment they immediately caused to be issued an execution, which was returned by the marshal wholly unsatisfied.

May 9th, 1870 they sued out an alias execution, which was levied upon the premises in question as the property of Robert Forsythe, and on June 7th, 1870, the property was sold thereunder to Adolphus Brandies and William H. Crawford for $11,600, the amount of their judgment and costs. And on September 9th, 1871, the time for redemption having elapsed, there was issued to them a marshal's deed for the property, which deed was duly recorded September 12th, 1871. September 10th, 1871, they went into possession of the premises and remained in possession until after the filing of their bill.

FACTS CONCERNING THE TITLE OF CROSS-COMPLAINANT.

On March 30th, 1861, Robert Forsythe with his own means, purchased the property in dispute. Being then, as he says, out of debt, he caused it to be conveyed by a deed bearing date March 30th, 1861, and recorded on that day, to William R. Arthur, upon the following trusts declared in said deed.

"To permit Mary E. Forsythe, wife of Robert Forsythe, of Chicago, to use and occupy, enjoy and receive, the rents and profits of said lands and premises, for her life and to her own use and at any and all times, upon the order or request in writing of said Mary E. Forsythe and said Robert Forsythe jointly, to convey said lots, or either or any part of them, to such person or persons as they may designate; and in case said Mary E. shall die without issue in the lifetime of her said husband, then to convey said lands to said Robert Forsythe for life, immediately after the decease of said Mary E., to hold to him and his use for life, and to his child or children, if any lawfully begotten, in fee simple and remainder, to their use and to them equally as tenants in common. But if said Robert shall die without lawful issue, then to the children of his brother, Leonard E. Forsythe, and the children of Lydia T. Warrack, who may be in being at the time of said Robert's decease, in fee simple and remainder, to their use and to them equally as tenants in common; and in case said Robert shall die without lawful issue in the lifetime of said Mary E., then

to convey said land and premises to her for life, immediately after the death of said Robert, to hold to her and her own use for life, and to the children of said Leonard E. Forsythe and the children of said Lydia T. Warrack who may be in being at the time of said Mary's decease, in fee simple and remainder as aforesaid, to their use and to them equally as tenants in common. But if hereafter said Robert shall have child or children born of his said wife or of any future wife, then instead of the conveyance aforesaid to the children of said Leonard E. Forsythe and Lydia T. Warrack, said trustee is to convey said lands to said Mary E. Forsythe, or to said Mary E., or to said Robert (as the one may chance to survive the other, to her or to his use for life as aforesaid, and to the child or children who may be so born to them or him, in fee simple and remainder, to their use and to them equally as tenants in common."

After his purchase, Robert Forsythe, with his own means proceeded to enclose the lots in controversy and make valuable improvements thereon, including a large brick dwelling house, a conservatory, a barn, etc. At the date of the recovery of the judgment before mentioned, he and Mary, his wife, were occupying the premises as a homestead, and continued so to do until Mary's decease, about January 1, 1870.

March 26, 1868, Robert Forsythe was, on his own individual petition, adjudicated a bankrupt, and on July 21, 1868, he received his certificate of discharge. Whether at the time of these bankruptcy proceedings there were any partnership assets, does not directly appear from the record. Among the liabilities scheduled by Forsythe, there was an indebtedness to Brandies & Crawford of the amount of their judgment, but their address being given in the schedule as Pittsburgh, Pennsylvania *(Record, 62)*, they failed to receive any notice of the proceedings. They did not hear of such proceedings until shortly after the discharge *(Record, 61)*, and hence never made any proof of their claim. In his schedule of assets Forsythe did not include the premises in dispute; nor any interest in them. *(Record, 76.)*

In November, 1869, there was filed in the Superior Court of Cook County, Illinois, a bill to reform the original conveyance in trust to Arthur. In pursuance of a decree entered in this suit, a master in chancery executed a deed of correction of the original conveyance to Arthur, whereby it was provided that the conveyance to be made by said Arthur, on the request of said Robert and Mary, should be in fee simple absolute, and operate to cut off and revoke the several trusts thereafter specified in said deed. Neither Brandies nor Crawford was a party to the suit. On November 3, 1869, Robert Forsythe and wife served upon Arthur, trustee, a written notice, reciting, among other things, the pendency of the suit for reformation of the original conveyance to him, and containing a joint request by them that, as soon as a decree granting the relief prayed for was obtained, he should, in pursuance of the terms of said reformed deed, convey the premises to Nathan Corwith, in fee simple.

On January 4, 1870, which was after the death of Mary, wife of Robert Forsythe, Arthur conveyed to Corwith as requested. This conveyance, though in form abolute, was, in fact, given as security for an indebtedness due Corwith from Forsythe, and was accepted by Corwith upon the express understanding that, on the payment of the debt, he would convey to Forsythe. (*p. 77, Record*)

By a deed dated March 12, 1870, and acknowledged March 14, 1870, Corwith conveyed the property to Robert Forsythe (*pp. 98 and 99, Record*). And the latter, by deed of trust dated March 10, 1870, and recorded March 15, 1870, conveyed the same to Scoville, trustee, to secure to John Cochrane, cross-complainant, the sum of $15,000, loaned by Cochrane to Forsythe.

(*P. 98, Record.*) The indebtedness of Forsythe to Corwith was about half of this sum, and was paid out of the money borrowed from the cross-complainant. (*P. 77, Record.*)

At the time of this transaction, the agents of Cochrane, who placed the loan for him, were aware that Cochrane held the title for money due him from Forsythe, and that part of the money loaned was to pay this indebtedness. (*Record, pp. 77, 78, 87.*)

In March, 1870, Cochrane and his agents went through the form of foreclosing, by notice and sale, the deed of trust given to Scoville, trustee. The property was bid off for the benefit of Robert Forsythe by his co-defendant, Wallace, for $16,700, being the amount then due. This procedure was a mere matter of form, resorted to for the purpose of cutting off all other claims. No money was to be, or was, in fact paid. "It was simply an adjustment or rearrangement of the security." (*Record, p. 87.*)

March 8, 1872, just prior to the trustee's sale and deed to him, Wallace purchased the property at a sale by Forsythe's assignee in bankruptcy, and received an assignee's deed therefor. (*Answer of Wallace, p. 14, and Cochrane, p. 26, Record.*)

In pursuance of this arrangement, a sale and deed were made by Scoville, trustee, to Wallace. A new deed of trust was then given by Wallace to Scoville, trustee, to to secure Cochrane the sum of $17,000. The excess of $300 above the old indebtedness was probably intended to cover the expenses attending the arrangement. In this new deed of trust there were included two additional lots, the title to which had previously been placed in Wallace for that purpose. As further security, John Forsythe,

brother of Robert, guaranteed the payment of the new notes.

It is alleged in the cross-bill, and there is some evidence to prove, that on May 1, 1876, there was a sale under the last-mentioned deed of trust to Cochrane. There is also an averment, but no proof, that he received a deed from the trustee, and the fact is not admitted in the answer.

ISSUES.

The questions presented by the record are:

1. Whether, at the time of the bankruptcy proceedings, Forsythe had an interest in the premises in dispute, upon which appellants' judgment operated as a lien, and if so, what interest he had.

2. If a lien attached, was it divested by the exercise of the alleged power of appointment.

3. Is Cochrane entitled to protection as a *bona fide* purchaser?

ASSIGNMENT OF ERRORS.

And appellants say there is manifest error on the face of the record, in this:

1. The court erred in finding that appellants were not entitled to relief, and in dismissing their bill for want of equity.

2. The court erred in finding and decreeing the title and right of possession to said premises to be in said John Cochrane.

3. The court erred in not finding and decreeing title to said premises to be in appellants, and in not quieting their title as against appellees.

4. The court erred in not directing possession of said premises to be surrendered to appellants.

BRIEF OF ARGUMENT.

I.

ON THE FACE OF THE TRUST CONVEYANCE, AN INTEREST WAS GIVEN TO ROBERT FORSYTHE, ON WHICH THE LIEN OF APPELLANTS' JUDGMENT ATTACHED.

See Record, p. 7.

(*a.*) The words used being insufficient to raise a trust for the separate use of the wife, the deed, in effect, gives the first life estate to Robert, with remainder to Mary for life.

(*See Argument, post p. 15.*)
Bowen v. *Setre & wf.*, 2 Bush. 112.
Wade v. *Fisher et al.*, 9 Richardson Eq. 362.
Chipchase v. *Simpson*, 16 Sim. 485.
Willis v. *Sayer*, 4 Madd. 409.
Beal v. *Spencer*, 2 You. & Coll. Ch. 561.
Kensington v. *Delano*, 2 Myl. & K. 184.
Austin v. *Austin*, Law R., 4 Ch. 236.
Taylor v. *Lake*, 2 Russ. & My. 183.
Hartly v. *Hurle*, 5 Ves. 547.

(*b.*) Conceding the trust to be for her separate use, Robert took a vested remainder for life.

(*See Argument, post p. 18.*)
Wash. on Real Prop., p. 547, vol. 2 (4th Ed).
Id., pp. 412, 413, 609, 612, 614, 616, 617, 618.
Kent Comm., Vol. 4 (10th Ed.), 203.
Full v. *Jacobs*, 3 Law Rep., Ch. 707.
Lanison v. *Lanison*, 18 Beav. 1.
Fearne on Conting. Rem. (Ed. 1881), p. 2 Butler's note (*b.*)
Kent's Comm. vol. 4 (10th Ed.) p. 202.
Williams on Real Prop. 241.
Weston v. *Weston*, 125 Mass. 168.

Darling v. *Blanchard*, 109 Mass. 176.
Wright v. *Shaw*, 5th Cush. 56.
White v. *Curtis*, 12 Gray, 54.
Blanchard v. *Blanchard*, 1 Allen, 223.
Kent's Comm. vol. 4 (10th Ed.) 202.
Sugden on Powers, vol. 2, pp. 2 to 6 (Ed. 1856).

(c.) The lien of the judgment attached to Robert's interest, whether vested or contingent. *(See Argument, post, 22.)*

The following is a copy of the statute relating to lien of judgments, in force at the time judgment was rendered:

All and singular, the goods and chattels, lands, tenements, and real estate of every person against whom any judgment has been, or hereafter shall be obtained in any court of record, either at law or in equity, for any debt, damages, costs, or other sum of money, shall be liable to be sold on execution to be issued upon such judgment, and said judgment shall be a lien on such lands, tenements and real estate, from the last day of the term of the court in which the same may be rendered, for the period of seven years: *Provided*, That execution be issued at any time within one year on such judgment, and from and after the said seven years, the same shall cease to be a lien on any real estate, as against *bona fide* purchasers, or subsequent incumbrancers by mortgage, judgment, or otherwise. *Provided*, That in case the party in whose favor any such judgment shall have been entered, shall be restrained by injunction out of chancery, or order of any judge or court, either from issuing execution, or selling thereon, the time which he shall be so restrained shall not be deemed or considered as any part of said seven years. The term "real estate" in this section shall be construed to include all interest of the defendant in or any person to his use, held or claimed by virtue of any deed, bond, covenant, or otherwise, for a conveyance, or as mortgagee or mortagor of lands in fee, for life or for years.—Sec. 1, chap. 57, Rev. Stat. 1845.

White v. *McPheeters*, 75 Mo., 286.
Wash on Real Property, vol. 2, p. 562.

Also cases cited (see Argument, post p. 55), as follows:

Williams v. *Amory*, 14 Mass. 20.
Kelly v. *Morgan*, 3 Yerg. 437.
Lockwood v. *Nye*, 2 Swan, 515.
Wiley v. *Bridgman*, 1 Head. 68
Rickey v. *Helman*. 2 Halst. 180.
Burton v: *Smith*, 13 Pet. 464.
Tyndale v. *Ware*, 3 Jacob, 212.
Smith v. *Angell*, 2 Lord Ray. 733.

II.

WAS THE LIEN DIVESTED BY THE EXERCISE OF THE ALLEGED POWER OF APPOINTMENT?

(See Argument, post p. 23.)

1. Forsythe's interest having passed to the assignee in bankruptcy, subject to the lien of the judgment, could not he defeated, nor the lien displaced by a subsequent exercise of the power.

(See Argument, post p. 24.)

Doe v. *Brittain*, 2 Barn. & Ald. 93.
Jones v. *Wenwood*, 4 Mees. & Wils. 653; S. C. 10, Sim. 150.
Hale v. *Escott*, 2 Kee, 444; S. C., 4 Myl. & Graig, 487.

2. The power was extinguished *pro tanto* by the judgment.

(See Argument, post p. 26.)

Carc v. *Holford*, 3 Vesey, 657.
Cox v. *Chamberlain*, 4 Id. 637.
Maundrell v. *Maundrell*, 7 Id. 557.
S. C. before Chancellor, 10 Id. 246.

Morton v. *Lees*, C. C. Lancaster Mch. Assizes, 1819.
Ray v. *Pung*, 5 Barn. & Ald. 569.
Doe v. *Jones*, 10 Barn. & Cres. 459.
Skeels v. *Shearley*, 8 Sim. 153. S. C. on appeal, 3 Myl. & Cra, 112.
Taylor v. *Stibert*, 2 Ves. 437.
White v. *McPheters*, 75 Mo. 286.

3. The alleged appointment to Corwith, being by way of mortgage, could, as against creditors, operate only *pro tanto*, if at all.

(See Argument, post p. 34.)

Perkins v. *Walker*, 1 Vern., 97.
Thome v. *Thome*, Ibid. 141–182.
Skeeles v. *Shearley*, 3 Myl. 1 Cra. 112.
Sugden on Powers, vol. 2 p. 19. (Am. ed. 1856.)
White v. *McPheeters*, 75 Mo. 286.
Jones v. *Clifton*, 11 Otto, 225.

III.

THE POWER RESERVED TO FORSYTHE, GAVE HIM THE EQUITABLE FEE ON WHICH A LIEN WAS CREATED BY THE JUDGMENT.

The Illinois statute, in force now, and at the date of the deed in trust to Arthur, and also at time of the rendition of judgment regarding the force and effect of English common law and statutes, is as follows:

Sec. 1 "The common law of England, so far as the "same is applicable and of a general nature, and all statutes "or acts of the British Parliament made in aid of, and to "supply the defects of the common law, prior to the fourth "year of James the First, excepting the second section of

"the sixth chapter of the forty-third Elizabeth, the eighth "chapter of thirteenth Elizabeth, and ninth chapter "of thirty-seventh Henry Eighth, and which are of a "general nature, and not local to that kingdom, shall "be the rule of decision, and shall be considered as of "full force until repealed by legislative authority."—*Rev. Stat. 1845. P. 337.*

(*See Argument, post, p. 36.*)
(*Talmadge* v. *Sill*, 21 Barb. 34.
Johnson v. *Cushing*, 15 N. H. 298.
Lassels v. *Cornwalles*, 2 Vern. 465.
Cogkill v. *Holmes*, 12 Ves. 213.
Sugden on Powers, vol 2, p. 234. (Am. ed. 1856.)
May on Fraud. Conv. pp. 93 and 94.
Prindeaux on Conveyances, vol. 2, p. 209.
Tarbuck v. *Marbury*, 2 Vern. 510.
Smith v. *Hurst*, 10 Hare. 44.
Davidson on Conveyances, 679, 695, 699.
Townsend v. *Windham*, 2 Vesey, Sr. 2.
Hungerford v. *Earle*, 2 Freeman, 120.
Rock v. *Dale*, Melmouth, Mss. 108.
Baizton v. *Ward*, 2 Atk. 172.
Chance on Powers, secs. 1830, 1846, 1878.
Troughton v. *Troughton*, 3 Atk. 656.
Townsend v. *Windham*, 2 Ves. Sr. 1.
Peacock v *Monk*, 1 Ves. Sr. 127.
In re Pearson, 3 Ch. D. 807.
Ware v. *Gardner*, 7 L. R. Eq. 807.
Coolidge v. *Melvin*, 42 N. H. 510.
Kent's Comm., Vol. 4, p. 311.
Johnson v. *Harvey*, 2 Penn. Rep. 82.
Mackason's Appeal, 42 Penn. St. 330.

Benton v. *Hook*, 3 Md. Ch. 477.
McIlvane v. *Smith*, 42 Mo. 45.
Pacific National Bk. v. *Windam*, 133 Mass. 175.
Henry v. *Armstrong*, 17 L. R. Ch. 688.
May on Fraudulent Conv., p. 451.
Davidson on Conv., vol. 3, title Settlements, p. 695,

IV.

THE JUDGMENT WAS A LIEN ON FORSYTHE'S ESTATE IN REVERSION, WHICH, ON THE REVOCATION OF THE TRUSTS DECLARED IN THE DEED TO ARTHUR, BECAME ABSOLUTE.

(See Argument, post, p. 55.)

Williams v. *Amory*, 14 Mass. 20.
Kelley v. *Morgan*, 3 Yerg. 437.
Lockwood v. *Nye*, 2 Swan. 515.
Wiley v. *Bridgman*, 1 Head. 68.
Rickey v. *Hilman*, 2 Halst. 180.
Burton v. *Smith*, 13 Peters, 464.
Jacobs v. Ware, 3 Jacobs, 212.
Smith v. *Angell*, 26 Ld. Raymond, 733.
Barlow v. *Salter*, 17 Ves. 479.
Conkling v. *Conkling*, 3 Sandf. Ch. 64.
Anderson v. *Jackson*, 16 Johns. 382.

V.

COCHRANE NOT ENTITLED TO PROTECTION AS A BONA FIDE PURCHASER.

(See Argument, post p. 60.)

Evidence as to notice.

See Record, pp. 87, 77, 88, 92, 34.
Lane v. *Tidbal*, 1 Gilmer, 130.

Gray v. *Hancock*, 1 Rand, 72.
James v. *Gibbs*, 1 Patt. & Heath, 277.
Gibson v. *Jones*, 5 Leigh, 370.
Miller v. *Argyle*, Ibid. 466.
Wilkens v. *Gordon*, 11 Id. 547.
Peck v. *Peck*, 9 Yerg. 301.
Hunt v. *Bass*, 2 Dev. Eq. 292.
Johnson v. *Easou*, 3 Ired. Eq. 330.
Norman v. *Hilles*, 2 Patt. & Heath 676.
Wood v. *Lake*, 62 Ala. 486.
Boone v. *Childs et al.* 10 Pet. 178.

ARGUMENT.

I.

ON THE FACE OF THE TRUST CONVEYANCE TO ARTHUR AN INTEREST WAS GIVEN TO ROBERT FORSYTHE ON WHICH THE LIEN OF APPELLANTS' JUDGMENT ATTACHED.

(*a.*) The words used being insufficient to raise a trust for the separate use of the wife, the deed in effect gives the first life estate to Robert, with remainder to Mary for her life.

(*b.*) Assuming the deed to create a separate estate in the wife, a vested remainder for his life was given to Robert.

(*c.*) Whether his remainder was vested or contingent, a lien attached.

"A."

NO TRUST FOR THE SEPARATE USE OF THE WIFE WAS CREATED BY THE DEED TO ARTHUR.

The deed in question was executed prior to the enactment of the "Married Woman's Act" in Illinois. And, in the absence of statute, the rule is well settled, that to exclude the marital rights of the husband, clear and explicit words of exclusion are indispensable. Being bound to maintain his wife, he is, *prima facie*, entitled to the rents and profits of her real property during the coverture. To confer upon her a separate estate, the intention must be clearly and unequivocally declared.

A conveyance *from a husband to the use* and benefit of his wife, "annually to be appropriated for her life,"

remainder to himself, if he should survive her, does not vest in her a separate estate.

Bowen v. *Setterce and wife*, 2 Bush. 112.

A conveyance from a husband gave certain slaves to his wife, "and to her heirs by him," to have and to hold for their special use and benefit forever. It contained a proviso, that "in the event of her marrying again after "his death, the slaves and the increase were to be equally "divided between her and the heirs aforesaid." "But if "there should be no heirs of her body by him, then the "slaves and their increase were to be hers forever" *Held*, that the deed was inoperative—it amounting to no more than a gift to himself; that a gift, even in trust, to the wife's special use and benefit, is not a gift for her separate use so as to obstruct marital rights. And this attempted gift from the husband being to the wife *generally*, not to her separate use, had no more operation than a gift to himself. The slaves, it was held, were subject to execution for the debts of the husband.

Wade v. *Fisher*, *et. al*, 9th Richardson Eq. 362.

The words, "for her sole use and benefit" do not raise a trust for the separate use of a married woman. *Chipchase* v. *Simpson*, 16 Sim. 485. Neither do the words "for her own use and benefit." *Wills* v. *Sayer*, 4 Madd. 409. *Beal* v. *Spencer*, 2 Youn. & Coll. Ch. 561. *Kensington* v. *Delano*, 2 My. & K. 184. Nor the words "for her maintenance and support." *Austin* v. *Austin*, Law R. 4, ch. 236. Nor do the words "to pay unto her own proper hand for her own proper use and benefit." *Taylor* v. *Lake*, 2 Russ & My. 183. In the last case, *Hartley* v. *Hurle*, 5 Ves. 547, was cited in support of the claim that a separate use was created

by these words. To this it was answered, that no such point appears to have been decided in that case, and that *Lamb* v. *Milnes*, referred to in the note as supporting that doctrine, decides the other way.

In this case the trust is to permit Mary E., wife of Robert Forsythe, " to use, occupy and enjoy, and receive the rents and profits of said lands and premises " for her life and " to her own use." Under the authorities above cited, this language is clearly insufficient to create a separate use.

Considering the peculiar form and structure of this deed, the *order* in which the several clauses appear, can shed but little light upon its proper interpretation.

Special attention is asked to the last clause, which is as follows:

"But if hereafter, said Robert shall have child or children born of his said wife, or of any future wife, then instead of the conveyance aforesaid to the children of said Leonard E. Forsythe and Lydia T. Warrack, said trustee is to convey said lands to said Mary E. or to said Robert (as the one may chance to survive the other), to her or his use for life as aforesaid, and to the child or children who may be so born to them or him, in fee simple and remainder, to their use and to them equally as tenants in common."

Taking the deed as a whole, in connection with the use actually made of the property, the intention evidently was for the husband and wife to occupy the premises during the coverture or until he should want to sell and dispose of the fee. If, on the death of either, it should remain undisposed of, then a life estate was to be conveyed to the survivor, with remainder to *their* or *his* issue, and, in default of such issue, then over.

Suppose that without the consent of her husband, Mary had conveyed her life estate; would the purchaser be entitled to the possession during the coverture, as against him? He would, of course, be so entitled if she

had a separate estate. It is submitted, that viewing the deed as a whole, and in connection with the circumstances, no intention so to place the property at her disposal can be inferred. The absence of words excluding his marital rights during the joint lives, and the direction to convey to the survivor for life, negatives any such intent and gives to him an absolute estate for life, which is liable for his debts.

"B."

CONCEDING THE TRUST TO BE FOR HER SEPARATE USE, ROBERT TOOK A VESTED REMAINDER FOR LIFE.

The word "remainder" is no term of art which it is necessary to employ in creating a remainder.

Wash. on Real Prop., vol. 2, p. 547 (4th Ed).

Whether vested or contingent, remainders may be limited by way of use as well as by common-law conveyances.

Ibid, 412, 413, 609, 612, 616, 617.

If a use is to arise without any preceding limitation, it is a springing use.

Ibid. 614.

If to take effect in derogation of some other estate, it is a shifting use.

Ibid. 618.

If it is to wait till a prior estate expires, it is a remainder, and subject to the same rules which govern contingent and vested remainders, created by common-law conveyances.

Ibid. 616.

The law favors vested estates, and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested.

4th Kent, *203 (10th Ed).

"It is the present *capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder. When the event on which the preceding estate is limited must happen, and when it also may happen before the expiration of the estate limited in remainder, that remainder is vested."

Ibid. *203.

By reference to the last clause of the deed it will be seen that whether Mary left issue or not the estate was to be conveyed to Robert on her decease. If the estate in remainder had been a fee, the words "of survivorship" might possibly render it contingent. It might then be said that it was uncertain who was to take. As it is, however, no such uncertainty can exist. When a decision is reached as to whom the first life estate is given, the next taker is ascertained. The estate of the first is vested in possession. That of the latter in interest.

It may be contended that during the life of Mary, Robert did not have the capacity of taking if the estate should become vacant; that her estate might terminate by forfeiture or otherwise in her lifetime, and that his estate was not to take effect until her decease. But the contrary is clearly established by the authorities.

The words from and after her decease refer, not to his capacity to take, but to the *end* of the preceding estate. They are words of limitation applied to the preceding estate, and not words of qualification affecting the capacity of the next taker. "After the decease" of the first taker is equivalent to "after the expiration of his life estate by death or otherwise." Although the ulterior

limitation is in terms not to take effect until the decease of the first taker, yet in point of fact it is to take effect in veery event which removes the prior estate out of the way.

Full v. Facobs, 3Law Rep. ch. 703.
Lainson v. *Lainson*, 18 Beav. 1.

"If A *convey* or devise to C for life, and after his decease to B and his heirs, B's estate is rested in him in *interest*."

Butler's note (b) to Fearne on Con. Rem., p. 2 (ed. 1881).

A similar example of a vested remainder is given by Chancellor Kent, vol. 4, p. *202, of his Commentaries (10th ed.)

"A grant of an estate to A for life with remainder to B in fee, or to A for life, and after his death to B in fee, is a grant of a fixed right of immediate enjoyment in A and a fixed right of future enjoyment in B."

And in Williams on Real Prop. 241, the mode of creating vested remainders is thus described.

"To A for his life, *and after his decease* to B for his life, *and after his decease* to C for his life, and so on. This method of limitation is quite sufficient for the purpose, although it by no means expresses all that is intended. The estate of B and C and the rest are intended to be as immediately and as effectually vested in them as the estate of A; so that if A were to forfeit his estate B would have an immediate right to possession; and so again C would have a right to enter, whenever the estates of A and B might determine. The words 'and after his decease' are therefore considered a sufficient expression of an intention to confer a vested remainder for life. In the case we have selected of numerous estates everyone given only for the life of each grantee, it is manifest that very many of the grantees can derive no benefit; and should the first grantee survive all the others *and not forfeit his estate*, not one of them will take anything. Nevertheless each of the grantees has an estate for life in remainder, immediately *vested* in him; and each of these remainders is capable of being transferred, both at law and in equity, by a deed of grant in the same manner as the reversion."

In *Weston* v. *Weston*, 125 Mass. 168, the trustees, "as soon as may be" after the decease of the testator's widow, "were to *convey* or pass to his son and daughter, in equal shares," the estate given in trust, *if they both survived*

the widow. In case either of them died without leaving issue in the lifetime of the testator's widow, the estate to be transferred or conveyed to the survivor.

Held, that the son and daughter each took a vested remainder, expectant on the termination of the widow's life estate, and liable to be divested only by the death of either of them in the widow's lifetime without leaving issue; that the interest was given by the will, not by the conveyance from the trustees. Such conveyance, it is said, was needed to make that a legal estate which under the will and prior to the conveyance was an equitable interest.

In *Darling* v. *Blanchard*, 109 Mass., 176, a testator gave a fifth part of his estate to pay the income to his daughter for life, and on her death to *convey* said fifth part to her children, share and share alike *Held*, that the children of the daughter took a vested remainder. The direction to the trustees to convey to her children on the death of the daughter was, it is said, "a natural expression where the *remainder vested* immediately, but the *legal title* is in the trustee until the period to which the possession is postponed."

To the same effect are *Wright* v. *Shaw*, 5th Cush. 56; *White* v. *Curtis*, 12 Gray, 54, *Blanchard* v. *Blanchard*, 1 Allen, 223.

Again, if in case of the expiration of the life estate of Mary Forsythe, otherwise than by death, that of Robert would fail, so would all subsequent limitations, and the equitable fee would revert to him. If the remainder to him was contingent, it could only fail of taking effect at the expiration of the prior estate, by the happening of an event which would give him the fee. He had then a fixed

interest to take effect after the particular estate was spent. This interest would not be less than an estate for life, and might be a fee expectant upon the determination of the particular estate. He had an estate for life certain, with a possible fee. It falls strictly within the definition of a vested interest.

4 Kent, 202 (10th Ed.)

It was none the less a vested estate, by reason of the alleged power of appointment.

A limitation after a power of appointment, as, to the use of A for life, remainder to such use as A shall appoint, and in default of appointment to B, is a vested remainder, though liable to be divested by the execution of the power.

4th Kent 262 (10th ed.)
Sugden on Powers, 2 vol , pp. 2 to 6 (Ed. of 1856.)

"C."

THE LIEN OF THE JUDGMENT ATTACHED TO ROBERT'S INTEREST, WHETHER VESTED OR CONTINGENT.

By the Illinois statute relating to judgment liens, in force at the time of the rendition of judgment (see p. 9 hereof, where statute is copied at length), the term real estate is made to comprehend "all interest of the defend-"ant, or any person to his use, held or claimed by virtue of "any deed, bond, covenant or otherwise, for a conveyance, "or as mortgagee or mortgagor of land, in fee, for life or "for years."

A remainder, even though contingent, is an interest in lands within the meaning of this section.

An act, no broader in its terms than is this, was

construed by the Supreme Court in *White* v. *McPheeters*, 75 Mo. 286. There the statute declared, so the court say, that the term "real estate" shall include "estates and interests in land," and that all real estate whereof a defendant shall be seized, either in law or equity, shall be subject to seizure and sale under execution. The remainder in that case was a fee, but whether vested or contingent the court declined to decide, holding that in either event it was liable to be taken in execution under the statute.

Speaking of the alienability of such interests, Mr. WASHBURNE, in his work on real property (vol. 2, p. 562), says :

> "For a long time a contingent remainder was not supposed to be subject to alienation, because it was rather a possibility than an estate, like the possibility of an heir-at-law, for instance, having the estate when his ancestor shall have died. But it is now settled, that where the contingency upon which the remainder is to vest, *is not in respect to the person, but the event*, where the person is ascertained who is to take if the event happens, the remainder may be granted or devised, and the grantee or devisee will come into the place of the grantor or devisor, with his chance of having the estate. But if the contingency is in the person who is to take, as where the remainder is limited to the heirs of one now alive, there is no one who can make an effectual grant or devise of the remainder."

If it is such an interest as can be sold and conveyed by the judgment debtor, why not by the marshal for him ? But whatever may be the general rule, the terms of the statute are clear and explicit and can admit of no doubt.

For other authorities upon this point, see cases cited under the IV. division of this argument.

II.

WAS THE LIEN DIVESTED BY THE EXERCISE OF THE ALLEGED POWER OF APPOINTMENT.?

Appellants insist that it was not, because :

1. So far as the interest of Forsythe was concerned, the power was extinguished by his bankruptcy, and his

estate passed to the assignee, subject to the lien of appellants' judgment.

2. The power was extinguished *pro tanto* by the judgment.

3. The alleged appointment to Corwith was, in effect, a mere mortgage. As against creditors, it could operate as an exercise of the power *pro tanto* only.

1.

FORSYTHE'S INTEREST HAVING PASSED TO THE ASSIGNEE IN BANKRUPTCY, SUBJECT TO THE LIEN OF THE JUDGMENT, COULD NOT BE DEFEATED, NOR THE LIEN DISPLACED BY A SUBSEQUENT EXERCISE OF THE POWER.

So far as respects any interest or estate limited to the bankrupt, in default of appointment, a power vested either in him alone or in him jointly with another, is extinguished by the bankruptcy. This is settled by the following authorities:

Doe v. *Brittain*, 2 Barn. & Ald. 93.

Jones v. *Wenwood*, 4 Mees. & Wils. 653, S. C., 10th Sim. 150.

Hole v. *Escott*, 2 Kee, 444, S. C., 4th Myl. & Cra., 187.

English statutes now in force go to the extent of authorizing the assignee to exercise a mere power vested in the bankrupt for his own benefit. But most of the decisions above cited were under the 13th of Elizabeth, C. 7, Sec. 2, which enables the commissioners to dispose of any "estate for such use, right or title as the bankrupt shall have in the same, which he might lawfully depart withal."

An estate limited to the bankrupt in default of appointment, being a vested interest, would pass to the

assignee, under either this statute or our own. And in the cases cited the question was, could the title of the assignee be divested by a subsequent exercise of the power? It will be seen, therefore, that they do not depend upon any principal peculiar to the English bankrupt law, and are directly in point. They hold that after the bankruptcy, the bankrupt may exercise a power operating upon estates limited to persons other than himself, but not so as to displace any interest which has passed to the assignees.

In *Hale* v. *Escott* the power was to be exercised by the bankrupt and his wife, jointly. The master of the Rolls, page 465, 2 Kee, says:

"The appointment could only take effect out of the ultimate remainder in fee vested in the husband, and if the power had been to be exercised by the husband alone, I am of opinion that, upon the authority of *Badham* v. *Mee*, it would have been extinguished; and the question is therefore reduced to this, whether the husband, who could not exercise a separate power, could exercise a joint power of appointment vested in him and his wife?

"The estate for life in the husband, and the ultimate remainder in fee were vested in the assignees by act of law, in this respect equivalent to a conveyance. If there had been a conveyance, the husband could not derogate from his own grant; and I am of opinion that he could not, by joining his wife, defeat the effect of the act of law to which his estate had become subject; and it appears to me, that his disqualification made it impossible that the joint power should be exercised."

On appeal, the Lord Chancellor concurred as to the invalidity of the appointment by the husband and wife; but held that a subsequent appointment by the wife under a separate power reserved to her as survivor, was valid.

4th Myl. & Cra. 187.

Forsythe's interest passed to the assignee, subject to the lien of appellants' judgment, and the assignee's sale and deed to Wallace, under which Cochrane claims, being subsequent to the marshal's sale and deed to appellants, nothing passed by the former.

2.

THE POWER WAS EXTINGUISHED PRO TANTO BY THE JUDGMENT.

Under the deed to Arthur, Forsythe took an interest as well as a power. Until, and in default of appointment, an estate was limited to and vested in himself. On this estate, the lien of appellants' judgment had attached.

Whether the donee of the power could, under any circumstances, so exercise his power as to divest his own interest and with it a lien or charge attaching thereon, was formerly much doubted. There are few points, says Mr. Sugden, upon which a greater difference of opinion has prevailed. Finally, however, it was settled, that in certain cases, the exercise of the power did overreach and destroy the interest previously vested in the donee, and all charges and liens depending upon such interest.

The mode of conveyance through which that result was accomplished was originally introduced for the purpose of barring dower, and was known as the "Conveyance to uses to bar dower." The practice was to convey to such uses as the husband should appoint, and in default of and until such appointment to the use of himself in fee. Both the legal and equitable fee was vested in the husband, and he was enabled to dispose of it free and clear of the dower rights of the wife without troubling her for her consent. This and similar contrivances equally ingenious were resorted to for that purpose from a kind of necessity; there being no other method of barring dower except by fine levied or common recovery suffered by husband and wife, modes which were both troublesome and expensive.

As to the efficacy of this artifice for the purpose originally intended, the course of judicial opinion ran thus:

In *Carc* v. *Halford*, decided in 1798, Mr. Justice HEATH expressed an opinion, that an exercise of the power would bar the wife's claim of dower.

3 Vesey, 657.

In *Cox* v. *Chamberlain*, decided in 1799, Lord ALVANLEY spoke "rather dubiously of the question." He said that by an exercise of the power the estate in fee might be superseded, "though, perhaps, not to bar dower."

4 Vesey, 637.

In *Maundell* v. *Maundell*, decided in 1802, Sir WILLIAM GRANT, Master of the Rolls, said that the power was merely nugatory, being nothing distinct or different from the fee. The power being followed by a limitation of the fee until, and in default of, appointment, the power must be absorbed by the fee, which includes every power. The reason commonly given why a power might subsist with a fee, was that he might appoint in a mode by which he could not convey the fee. But, in that case, the power was to be executed by deed or will, and by these means the husband might have conveyed his interest. He therefore held, that the wife's right of dower was not barred.

7 Vesey, 569.

In the same case, on rehearing, Lord Chancellor ELDON expressed an opinion that a general power might subsist in the same person as the fee, and that an exercise of the power would defeat the claim of dower. Although, he said, a fee could be passed by an instrument of the same nature as that by which the power was to be exercised, yet the form of an appointment was different from that of a conveyance. He, however, confirmed the decree of the Master of the Rolls, on the ground that the words used were adapted to convey the interest, and not to

appoint the fee, and that, therefore, the purchaser took subject to dower.

10 Vesey, 246.

In *Morton* v. *Lee*, C. C. Lancaster, March Assizes, 1819, the point was decided against the widow's right. And in 1822, in the case of *Ray* v. *Pung*, 5th Barn. & Ald. 569, the point was decided in the same way, which, it is said, set the question at rest.

Upon the same principle, it has been held that the lien of a judgment against the donee of the power with the estate limited to him until and in default of appointment can be defeated by a subsequent exercise of the power.

It was so decided for the first time in 1832, in *Doe* v. *Jones*, 10th Barn. & Cress. 459. And for the last time in *Seeles* v. *Shearley*, 8th Sim. 133, which, in 1837, was affirmed on appeal. 3 Myl. & Cra. 112.

If the appointee was a purchaser for value, notice to him of the judgment was held immaterial, even in equity. "These decisions," says Mr. CHANCE, "have carried the rule that the appointee is in under the creator of the power to a very great extent." Parliament seems to have concurred in this opinion; for, soon after the decision of *Skeels* v. *Shearly*, we find that body interposing its authority for the protection of creditors against the operation of the technical rule referred to. By 1 & 2 Vict. c. 110, sec. 113, a judgment binds the estate of the debtor over which he has a power of disposition "for his own benefit without the assent of any other person." It being always in the power of a debtor to convey his own interest without the assent of any other person, this statute makes it impossible for him to defeat, by the exercise of a power, a lien attaching upon his own interest. It goes

further and binds the property over which he has a general and exclusive power, though he have no other interest; thus, so far as the rights of creditors are concerned, virtually abolishing all distinction between such a power and ownership.

A man ought not to be permitted to "fence against his creditors." By no sort of contrivance, ought he to be allowed, while retaining full control and absolute dominion over his property for his own purposes, to exempt it from the payment of his honest debts. A rule of law which sanctions or tolerates artifices having that object and effect, is opposed to the plainest dictates of reason and justice, and could have its origin only in the technical subtleties and refinements of the doctrine of uses. As is well known, the rule in question resulted from two principles, carried out to their extreme consequences.

1. That a power of disposition over an estate may be added to the fee and subsist in the same person.

2. That the appointee was in under the deed creating the power, and not as assignee of the appointor, though he well knew his purchase was from the latter, and that he was disposing of the estate for his own benefit.

The exceptions to it were as technical and as arbitrary as the rule itself. If in attempting to exercise the power the appointor used words adapted to convey his interest, the instrument was treated as a conveyance and the purchaser took the estate subject to all liens attaching upon it while in the hands of the appointor. The latter was not allowed to so exercise his power as to impair any interest previously created by his own voluntary act. But an interest or charge created by reason of his having taken unto himself a wife, or contracted a debt on which judgment was recovered, or even by having confessed a

judgment, was not considered as having been created by his own act, and such charges or interests he was permitted to destroy. Yet if he became bankrupt he could not, by an exercise of his power, defeat the conveyance of the commissioners, though this was no more his voluntary act than were those just mentioned. And why is not an interest attaching by operation of law just as sacred as though created by the debtor's own act? What solid reason can be given for the distinction?

None of the English decisions relied on in support of the rule are of any binding authority here, all having been decided since the Revolution. The rule itself is palpably absurd and unjust. It has never been recognized in this country, and had but a short-lived existence in England. Having been cast off and exploded in that country over forty years ago, is it not rather late now to think of incorporating it into our jurisprudence?

But supose the rule to be in force here, it has no application to the present case. It is true that in the cases cited, the exercise of the power cut off all intervening interests. This effect was produced through the operation of the statute of uses. By a conveyance to uses in the form above described, the statute immediately took the seizin from the trustee and transferred it to the husband or debtor until appointment. And as soon as a new use was declared, it immediately attracted the seizin; and the estate, which before was in the appointor, was divested and became vested in the appointee. By no other form of conveyance can an authority to be exercised over the estate of the donee of the power be given, so as to be distinct or different from the ownership. It is distinct, in this instance, only because it can be exercised in a mode by which the interest could not be transferred. Every

power not deriving its effect from the statute of uses is an authority in one person to dispose of an interest in another.

In this case, no power of appointment deriving its effect from the statute of uses was created. The legal title was vested in the trustee, and could only be divested by the conveyance provided for. The power reserved to Forsythe and wife was a power to compel such conveyance to whomsoever they might designate. So far as it related to that part of the estate to which their interest did not extend, it was a mere authority over such interest. And so far as it related to their own estate, was simply a means of transferring the ownership in which it was absorbed.

If, without the intervention of a trustee, the estate for life had been given to Robert and wife, with a power during their joint lives to dispose of the fee, and, in the event of their failure so to dispose of it, then over, no one would insist that a conveyance of the fee by them would operate to destroy a lien which had attached upon the life estate. Yet, on principle, the case supposed does not differ from the present. In the one instance, the donee of the power conveys the entire fee, including a part of the estate to which his interest does not extend, while in the other, the same result is reached through a conveyance by the trustee, which the life tenant has power to and does compel the execution of.

This distinction was pointed out in *Skeeles* v. *Shearly*, *supra*. In that case, *Taylor* v. *Stibert*, 2 Ves. 437, was cited as having decided that a purchaser, with notice of a covenant of the life tenant, was bound by it, although he took the estate under the exercise of a power; and, on the same principle, it was argued that he would also be

bound by a judgment. To this, it was answered that in *Taylor* v. *Stibert*, the legal estate was in trustees who held for all persons having an equitable interest in the estate; and that the covenant bound the equitable interest of the life tenant, which was distinct from the legal interest; whereas, when "land has been limited to the "usual uses to bar dower, the equitable estate is merged in "the legal." There is, in such case, no equitable estate, distinct from the legal, upon which a lien can attach.

In *White* v. *McPheeters*, 75 Mo., 286, the estate was originally owned by the husband, J. McPheteers. In consideration of $2,100 received from her father's estate, he in 1864 conveyed to Ann McPheeters, his wife.

In 1865, Mrs. McPheeters, her husband joining with her, conveyed said real estate to Redd, trustee, in trust for her sole and separate use, for and during her natural life; remainder in fee simple in trust for her husband, should he survive her; with covenants upon the part of the trustee, that upon the death of either A or J, whichever died first he would convey to the survivor; and if A and J at any time during their joint lives should wish to sell, he would, upon their joint request in writing, convey to any person designated by them, and pay over the purchase money to A, or pay or invest the same in other property, upon like trusts as A and J might direct.

None of the debts in question were in existence at the time of the execution of this conveyance. But all of them were contracted between that date and the date of a deed from J and A to one Whaley, who in consideration thereof gave his promissory notes. In 1873 the sale to Whaley was rescinded, whereupon Whaley and his wife conveyed the property to Mrs. McPheeters, for her sole and separate use; Redd, trustee, having in the meantime, upon the

written request of McPheeters and wife, conveyed the fee to Whaley.

After holding that the original conveyance, in trust to Redd, gave McPheeters either a vested or contingent remainder which was liable for his debts, the court say :

"It is, however, earnestly asserted by counsel that in said deed of trust to Redd, Mrs. McPheeters reserved a power of disposition or sale of the land to herself, the execution of which necessarily destroyed the remainder created in her husband, and that the power having been actually executed in the sale to Whaley destroyed whatever interest the creditors of McPheeters may have acquired, inasmuch as they could acquire no greater interest than McPheeters had under the deed, and which was subject to be defeated by the same contingency, and that therefore a negative answer should be returned to the question. The position thus taken has been pressed upon our attention in an ingenious and plausible argument, but the unsoundness of it consists in the assumption that Mrs. McPheeters reserved power in herself to destroy the estate created in her husband by a sale of the property and the appropriation of the proceeds of a sale to her own use. No such power as this was reserved in the deed. It simply provides that should Mr. McPheeters and wife, at any time during their joint lives, wish to sell said real estate, then Redd, the trustee, covenants that he will, on the joint request of said parties in writing, execute and deliver a deed, conveying said property to any person or persons designated by them, and pay over the purchase money to the said Ann W. McPheeters or invest the same in other property to be held upon the same trusts as said parties of the second part may direct. It is evident, we think, that this provision of the deed required the joint action of McPheeters and wife to effect a sale, *and that only upon their joint action and by their joint consent* could the trustee convey to a person designated, or pay the proceeds of a sale to Mrs. McPheeters. The deed contained no provision for the destruction of the estate in remainder of McPheeters, but simply devised a method for the sale of the entire estate when both parties interested in the beneficial interest desired it, and imposed an obligation on the trustee to convey, on their written request, the entire estate (the life estate being in Mrs. McPheeters, and the remainder in fee in him) and to any person to whom the persons thus interested might jointly sell it."

In this case neither the deed to Arthur as "reformed," nor any of its recitals, are binding upon appellants. They were not parties to the proceedings to reform, although their interest had been acquired long before such proceedings had begun. Even if all its provisions were contained in the original deed, the effect of a conveyance by the

trustee would be the same. It is not competent for a man to provide that his deed, in form a *conveyance*, shall operate not to *convey*, but to *defeat* his interest, so as to deprive a judgment creditor of his lien. Neither can he provide that a conveyance, to be executed by his direction, shall have that effect.

3.

THE ALLEGED APPOINTMENT TO CORWITH BEING BY WAY OF MORTGAGE, COULD, AS AGAINST CREDITORS OPERATE, ONLY PRO TANTO, IF AT ALL.

Upon this point it is sufficient to refer to

Perkins v. *Walker*, 1 Vern. 97.
Thorme v. *Thorme*, Ibid. 141, 182, and
Skeeles v. *Shearly*, 3 Myl. & Cra., 112.

The last case, while conforming to the general rule that a purchaser for value has precedence over a prior judgment, recognizes the judgment as a subsisting lien and as entitling the judgment creditor to redeem.

Corwith had, at most, but a lien for about seven thousand dollars. And all that Cochrane could fairly claim was to be subrogated to Corwith's rights. The most he could ask, would be a decree establishing a lien in his favor for so much of the money loaned to Forsythe as went to discharge Corwith's lien.

So far as the equity of redemption was concerned, the execution of the power by Forsythe was in his own favor. The power was not a mere naked authority, the exercise of which was needed to make the property affected by it liable for the debts of the donee. It was a power in him over his own estate. No case has gone so far as to hold that, by the exercise of such a power in his

own favor, or even in favor of a volunteer, a lien attaching upon the interest of the donee could be divested.

An estate appointed to a volunteer becomes assets of the appointor for the payment of his debts, even though the latter had no interest in default of appointment. Then, where the donee has an interest as well as a power, would it not be absurd to say that by appointing to a volunteer or to himself he could divest a lien attaching upon his own interest?

An instrument executing a power is deemed a conveyance within the statute (13 Eliz. C. 5), so as to be fraudulent as a conveyance.

Sugden on Powers, vol. 2, p. 19 (Am. ed. of 1856.)

A *voluntary* appointment, where the appointor has also an interest, is a fraudulent conveyance as against existing creditors at the time of the appointment.

Ibid. 234.

It was so held in *Whittington* v. *Jennings*, 6 Sim. 493, where a *voluntary* appointment was set aside as in fraud of creditors who became such after the creation of the power, but before its execution.

White v. *McPheeters*, 75 Mo. 286, is to the same effect.

Could an instrument which was a fraud upon appellants operate to divest their lien upon property still owned by their debtor?

It is only a purchaser or mortgagee *for value*, claiming under an appointment, who is preferred to a prior judgment creditor. One would suppose that, as against *prior judgment creditors*, such a purchaser or mortgagee *with notice* would, *in equity*, stand upon the same footing

as volunteers. It was so argued in *Skeeles* v. *Shearly*, *supra*, and that the mortgagee in that case must hold subject to the judgment lien, although he took under the exercise of a power. But it was held otherwise. Says the Lord Chancellor:

"No authority is cited for the distinction; but it was argued that this must be so, because a person claiming under the voluntary execution of a power would hold the property, in equity, as assets of the appointor for the benefit of his creditors, and that a purchaser for value with notice, is in the same situation as a voluntary purchaser. *It is the latter part of the proposition which fails*, as that rule does not apply against a purchaser for valuable consideration, although taken under a voluntary appointee."

According to this case, an appointment to a volunteer would not divest a judgment lien attaching upon the interest of the appointor. Upon what principle, then, could an appointment to himself have that effect?

There is no case which decides that a purchaser, even for value, could hold free from the lien of a judgment against the *appointee*. Here Forsythe was *appointee* as well as appointor. He was also the original owner of the estate and donor of the power. Besides this he had an interest vested in himself in default of appointment. How he could give this interest to himself so as to defeat the lien, or so as to enable him afterwards to defeat it by a conveyance of the interest, is difficult to imagine.

III.

THE POWER RESERVED TO FORSYTHE GAVE HIM THE EQUITABLE FEE ON WHICH A LIEN WAS CREATED BY THE JUDGMENT.

The rule is well settled that property appointed to a volunteer, under a general power, becomes assets of the appointor, and subject to the claims of his creditors. It is equally well settled that a power *conferred* upon the donee, if unexecuted, is not assets for the payment of his debts. A power is general, within the rule, if the donee

can appoint whomsoever he pleases, though there may be restrictions as to the instrument, the time, or the mode by which it is to be exercised.

Talmadge v. *Sill*, 21 Barb. 34.
Johnson v. *Cushing*, 15 N. H. 298.

That the distinction between the absolute power of disposition and the "absolute ownership" is in violation of principle and unjust to creditors, has long since been admitted. As was said by the New York revisers, there is "in reason and good sense" no such distinction, "and it "is an affront to common sense to say that a man has no "property in that which he can sell when he chooses, and "dispose of the proceeds at his pleasure."

In *Lassels* v. *Cornwallis*, 2 Vern. 465, it was observed by the Lord Keeper, that where the donee of the power had wholly omitted to appoint, the court had not gone so far as to do it for him; although he thought that might be "reasonable enough and agreeable to equity in favor of creditors."

So, in *Coghill* v. *Holmes*, 12 Vesey, 213, it was said by ERSKINE, Lord Chancellor, that there was no good reason, that he could comprehend, why, in the absence of the execution of the power, the court should not subject property affected by it to the claims of creditors. That there was good ground for criticism upon the court, for not having gone that far, was admitted. The inconsistencies and difficulties surrounding the subject he regarded as proper matters "for the consideration of the legisla-"ture, who may declare that where a power is given to "dispose of property by a certain act, if the party dies "without doing that act, still it shall be assets."

Mr. Chance, in his work on powers, expresses surprise that this had not been done; and we have seen that Parliament has since supplied the remedy, by making a general power equivalent to ownership, where the rights of creditors are concerned.

There is, it is true, no similar statute in Illinois. But it is also true that prior adjudications have not carried the doctrine in question so far as to embrace a case like the present; and if, as seems to be conceded, the doctrine is erroneous in principle and unjust in its operation, it ought not to be extended further.

In this case Forsythe is the source of title. He was the owner of the property, and the creator of the trusts—the *donor* as well as the *donee* of the power. After the life estates of himself and wife, the only valid limitations contained in the deed were contingent upon the birth of issue, the others being void for remoteness. He, therefore, secured to himself, besides his life estate, the reversion in fee. In addition to this, he reserved to himself the absolute power of disposition over the entire fee. With the consent of his wife he could revoke all the trusts, sell the property when and to whom he pleased, and pocket the proceeds. Where, then, was the substantial ownership of this property? Is it not "an affront to common sense" to say that it was in any one but Forsythe?

Can a man by a contrivance of that sort shield his property against his creditors? Sir Edward Sugden was clearly of the opinion that he could not.

"This is not the place to discuss the statute of the 13th of Elizabeth, C 5, which avoids fraudulent gifts and settlements to defraud creditors, and of course applies to a voluntary appointment where the appointor has also the interest; but we may simply observe, that although a *bona fide* voluntary settlement by a person not indebted at the time to the extent of insolvency would

be supported against creditors, yet if it contain a general power to the settler to dispose of or mortgage the estate, it will be deemed fraudulent as against creditors by statute and judgment, for a power of revocation in such a deed is said to be a constant evidence of fraud; but a power to revoke for a particular purpose may not make such a deed void."

Sugden on Powers, vol. 2, p. 234, Am. Ed. of 1856.

Mr. Chance was of the same opinion, as will be seen from the following sections of his work on powers:

Sec. 1843—"The statute of the 13th Elizabeth, which is especially directed to the relief of creditors, does not, like the statute of the 27th Elizabeth as to purchasers, expressly avoid instruments with provisions of revocation; but, perhaps, in most cases at least, the reservation of a power of revocation would be deemed a badge of fraud, *since the settler thereby in fact retains the ownership* of the property; indeed, LORD HARDWICKE so lays down the law in *Peacock* v. *Monk* (1 Ves. 132), when speaking of cases which have been determined without any difficulty, he says that if there is a power of revocation in such a deed it is a constant evidence of fraud. In such a case the relief would probably be carried farther than in an ordinary case of mere voluntary settlements."

Sec. 1846—"By analogy to the decisions on 27 *Elizabeth*, powers in form partial, but substantially full and general powers, may be thought to render settlements bad, in the same manner as express powers of revocation would; and even as to powers of a more limited nature, as powers to charge sums not at all approaching to the value of the estate, it may be urged that though they should not be executed, creditors and others entitled to relief under the statute of the 13th Elizabeth, ought, *to the extent of the powers*, to be allowed to substantiate their claims."

Sec. 1875—"The general object of the fifth section of the 27th Elizabeth, was to render an assurance containing a clause of revocation reserved to the settler—*or in other words, a nominal settlement, the settler remaining substantially the owner*—void as against a subsequent purchaser; thus, with respect to the subsequent purchaser, putting the assurance out of the way, as if it had never been made."

So was Mr. CRABB, author of the treatise on real property.

Sec. 2008—* * * "When a man makes a *voluntary* settlement and reserves to himself the power to mortgage what part he pleases, such a power, amounting to a power of revocation, will be void as against creditors."

The same doctrine is laid down by Mr. May in his work on Fraudulent Conveyances:

"If the deed is executed honestly for the purpose of giving security to creditors, or of putting the property out of the grantor's control, it is good

but if it is a contrivance resorted to for his own personal benefit, it is void and has no effect. It is not, therefore, surprising to find that a power of revocation in a deed has always been looked upon as a strong circumstance of fraud under this statute (*13 Eliz.*) as well as under the 27th Elizabeth, c. 4, in which it is expressly mentioned, for it enables the settler to deal with the property after having affected to convey it away."--Pp. 93-94.

And where there is a *de facto* power of revocation, though not in express terms (as a power to mortgage to any extent), it is the same. (*Ibid. p. 94.*)

And by Mr. Prindeax in his work on Conveyancing:

"If a settler reserve to himself a power of revocation, or a general power to mortgage the estate, the reservation of such a power is a sign of fraud, and the deed cannot be supported against creditors."--*Vol. 2, p. 209.*

And also by Mr. DAVIDSON. In vol. 3, title Settlements, p. 679, he says:

"Although the act of the 13th of Elizabeth contains no express provisions avoiding conveyances with power of revocation, as against creditors, corresponding to the provision in 27th Eliz. c. 4, sec. 5, avoiding such conveyances against purchasers; yet a voluntary settlement, revocable at the will of the settler, would, it seems, be deemed *ipso facto* fraudulent, within the meaning of the former. (*Tarback* v. *Marbury*, 2 Vern. 510. *Smith* v. *Hurst*, 10 Hare, 44.) And it may probably be inferred from the decisions under 27 Elizabeth, c. 4, that a power to revoke, with the consent of a person nominated by and at the devotion of the settler, would be within the act of 13 Elizabeth, c. 5; for, 'otherwise, the good provisions of the act, by a small addition and evil intention, would be defeated.' (*See 3 Rep. 82b.*) But that it would be different if the consent required were that of trustees, or other persons not under the control of the settler."

Again, on page 699 of same volume:

"If, however, it be an object that the settlement, although revocable by the settler, should be unassailable by creditors, the consent of trustees or other persons independent of the settler should be made necessary to the exercise of the power."

That the act of 13 Elizabeth, chap. 5, was in force in Illinois at the time of the execution of the deed in trust to Arthur, and also at time of the rendition of the judgment. (See sec. 1, chap 62, Rev. Stat., 1845, copied in full herein, p. 11.)

Where, to let in creditors, an execution of the power has been held necessary, it will be found that the estate affected by the power did not come from the donee; in other words, that his power was one which had been *conferred* upon, and not *reserved* by him.

It was so in *Holmes* v. *Coghill*, *supra*. Though Sir John Coghill joined in the settlement by which the power was created, yet the fund subject to the power was to be raised out of a remainder to the survivor, expectant on the termination of the father's life estate. This estate in remainder was derived from the son, the father never having had any interest in it.

So, also, in *Towsend* v. *Windham*, 2 Vesey, Sr., p. 2. There a power was conferred upon the life tenant to create a term for an uncertain period, out of the estate of a remainder man, after the latter should come into possession. The estate which would be affected by an exercise of the power had never been in the donee. It was a very peculiar case. Lord HARDWICKE is reported as saying (page 7, top paging), that he "did not know but this was an interest in the land itself." But, on taking time to consider, he was of opinion, that whether treated as a covenant or an interest, neither the testator nor any one in his place could have the benefit of it, without an appointment. This, however, was mere dictum. There having been an actual exercise of the power, the interest appointed was, of course, declared to be assets for creditors of the appointor.

Hungerford v. *Earle*, 2 Freeman, 120, arose in 1692. There was a conveyance upon trust to pay certain debts mentioned in a schedule, and afterwards for a provision for the grantor and her children, and the surplus to the

heir. This deed was assailed by a subsequent creditor. I quote from the report:

"It was insisted for the plaintiff that this was a fraudulent deed, there being a power of revocation. But to that it was answered, that it was not a general power, but by consent of trustees, which did not make it fraudulent within the statute; and so it was said by TREVOR, a power to revoke for a particular purpose would not make a deed fraudulent."

In this case it appears to have been conceded that the reservation of a general power would avoid the deed as against subsequent creditors. What the result was is not stated.

Tarback v. *Marbury*, 2 Vern. 510, was decided in 1705. A conveyance made by the defendant in 1672, was to the use of himself for life, remainder to the trustees and their heirs to pay all his debts. The deed, being attacked by subsequent creditors, was declared void:

First—"Because William Marbury continued in possession and kept the deed in his custody, and might produce it or not as he pleased; and the creditors had n notice of it."

Secondly—"Having reserved to himself a power to charge the estate with what sums he thought fit, amounts in effect to a power of revocation, and therefore fraudulent as against creditors by statute and judgment."

Rocke v. *Dale*, Melmouth Mss. 108, came before Lord COWPER, in 1709. A woman, before her marriage with a second husband, conveyed an estate to him and his heirs, he covenanting to charge it with £1,000 for the children of the wife by her former husband. Subsequent to the marriage, he charged the estate with the amount specified in the marriage agreement for the children, and then entailed it upon his own children. After this he borrowed money upon bond and died. The question was, whether the settlement was void against the bond creditor?

The Lord Chancellor, after holding that there was a defect of parties, and commenting upon the effect of the retention of possession by the settler, said:

"But now in the case before us there are two powers of revocation which makes it still stronger. (1) A power for the man and his wife jointly during coverture to revoke, so that he has in effect the power in himself, for the wife is *sub potestate viri*. (2) There is a power for him to revoke if he survives his wife, paying £1,000 to his wife's children. But I give no opinion."

Bainton v. *Ward*, 2 Atkins 172, was decided by Lord Hardwicke in 1741. The facts of this case are variously stated; one statement will be found in the report above cited, one in 2 Vesey, Sr., page 2, and one in 7 Vesey, but in neither does it appear whether the power was given or reserved. Below is the opinion of Lord HARDWICKE in full:

"I am of opinion that this ought to be considered as the personal estate of George Ward. Where there is a general power of appointment given or reserved to a person for such uses, interests and purposes as he shall appoint, this makes it his absolute estate, and gives him such dominion over it as will subject it to his debts.

"For it would be a strange theory if volunteers, as the legatees are, should run away with the whole estate, and that creditors for a valuable consideration should sit down by the loss without any relief in this court. The case of *Sherely* v. *Lord Ferers* is directly in point. *This money was not settled at all*, but was absolutely in the power of George Ward, and, consequently, there can be no doubt but his creditors must have the benefit of it. Suppose a man has power to dispose, by appointment, of a reversion in fee, and makes no disposition of it, yet it shall be assets to satisfy his creditors."

Mr. Chance, sec. 1830, intimates that some of the expressions here attributed to Lord Hardwicke are inconsistent with the general decisions of that eminent jurist, and must, therefore, be errors of the reporter. But Mr. Chance, in the same connection, says that the power in that case was *given*, and not *reserved*. Whereas, it would seem from the expressions referred to, that the power was *reserved*, and not *given*.* Upon that supposition the language here attributed to Lord Hardwicke is consistent with all of his decisions, and with the rule as laid down by Mr. Chance himself. It further appears that on two sub-

* See words italicised in above quotation.

sequent occasions the attention of Lord Hardwicke was called to the above decision; first, in 1747, in the argument before him of *Troughton* v. *Troughton*, 3 Atkins, 656; and again in 1750, this time in the argument before him of *Townsend* v. *Windham*, 2 Ves., Sr. In both instances his Lordship was reminded of his decision in *Bainton* v. *Ward*, as reported by Atkins, and in neither was there any dissent

Peacock v. *Monk*, 1 Ves. Sr. 127, was decided by Lord HARDWICKE, in 1748.

On July 17th, 1746, Admiral Lestock made two instruments, one of which he called a deed, the other his will. By the deed he put £4,000 into the hands of Monk to pay to the Admiral himself, for life, an annuity of £160, and afterwards to pay to Peacock and Cockburn £1,000 each, if they survived him; and an annuity of £100 for life to Mrs. Knowles, his house-keeper, if she survived him, and the residue to Monk. There was a provision that if the £160 be unpaid after any quarter day, Monk shall repay the £4,000 to Lestock himself, to be placed out in the names of Lestock and Monk. By the will, he made Monk executor and residuary legatee. The bill was filed by Peacock and Cockburn, who claimed that the trusts in their favor were intended as a reward for services rendered, and therefore founded on a valuable consideration. Whether the trusts were valid, as against creditors, was the question.

After deciding that the services having been rendered without promise of recompense, they did not, though beneficial and deserving of reward, constitute a valuable consideration, his Lordship said:

"Then, as to the consequence, and whether it could be good as against creditors, it depends upon its being fraudulent or not. *I do not mean as to*

the intent (although there is something like that), but a colorable fraud against creditors, in the notion of this court; and I am of that opinion, from the act of 13th Eliz. * * * But there is something bringing near to those *cases, which have been determined without any difficulty; that if there is a power of revocation in such a deed, it is a constant evidence of fraud*; and here is that which amounts thereto by the proviso: putting it in the power of Monk to enable Lescott to defeat it. * * * It is trne, indeed, that a man may give money in his life as he pleases, without creditors calling to an account or having it refunded; but then he must absolutely depart with the benefit during his life; otherwise a court of equity will inquire very strictly into it."

A man cannot, at one and the same time, give away his property and keep it. By no sort of contrivance, can he retain the control and enjoyment of his estate, free from the ordinary incidents of property, among which is that of liability to the claims of creditors present or future. The attempt has often been made, and many and various are the shifts and expedients which have been tried, to effect that object.

In 1858, a man, not engaged in trade, and out of debt, made a voluntary settlement upon the following trusts: First, a life estate in himself, determinable on bankruptcy, then a life estate to his wife, for her seperate use, then trusts for the children of the marriage, and an ultimate remainder to the settler. He engaged in trade, for the first time, in 1873, and in 1875, he became bankrupt. The settlement was held void *in toto*, as against the trustee in bankruptcy.

In re Pearson, 3 Ch. D. 807.

By a voluntary settlement a trader settled all his property, present and future, upon trust for his wife for her separate use for life, remainder for himself for life, remainder for his children, reserving the control of his stock in trade for himself. Five years later he became bankrupt. It did not appear that, at the time of the settlement, the settlor was indebted, except on some mort-

gages on part of the settled property, which had since been satisfied. Held, that under the statute of 13 Eliz. C. 5, the settlement was void as against the asignee.

Ware v. *Gardner*, 7 L. R. Eq. 807.

By identures between John T. Coolidge and Charles Coolidge, of September 1, 1841, the latter conveyed to the former his dwelling house. The deed recited that Charles wished to settle the property on his wife and children; that he owed some debts; that John had agreed to advance $500 to pay them, and more if needed, in consideration that Charles would settle the house in that way. The trusts of the deeds were as follows:

1. To permit the said Charles and wife to occupy the premises without rent. If not so occupied the trustee might lease the house and sell it when he saw fit.

2. In case of sale the trustee was to invest the proceeds and pay the income together with such rents as he had received to Charles and wife and the survivor. After their decease the property or its proceeds, less the expenses of the trust, were to go to the children.

Held: That the settlement was void as against subsequent creditors. Held, also, that any trust, whether declared by the deed or implied from the circumstances, by which the property appears to be held in any way for the benefit of the vendor is inconsistent with an absolute transfer and makes it fraudulent and void as to creditors; that where the trust is shown by the conveyance or is otherwise made to appear, an *actual intent* to hinder and defraud creditors *is an inference of law*, which is as effectual as if found by a jury.

Coolidge v. *Melvin*, 42 N. H. 510.

In May, 1849, Bartram conveyed his property to trustees, for his own use, for life, remainder to such persons as he should by will appoint, and in default of appointment, to the use of his lawful heirs in fee. The trustees were to pay the income to him during his life, as received, and not by anticipation, and free and clear of all debts incurred by him. At the date of the conveyance in trust, Bartram being indebted to to a considerable extent, the property in question was sold by the trustees, and after paying off these debts, the residue of the proceeds were invested, and the income paid to him by them during his life. Before his death, which occurred in 1857, he again became indebted to several persons, who claimed, as against the appointees, payment out of the funds in the hands of the trustees, which was allowed.

The court say:

"This statement brings us to the simple inquiry, can the owner of property so dispose of it, for his own use, benefit and support, as to put it out of the reach of liability for his future debts, he being and continuing *sui juris*, and there appearing to be no reason therefor, excepting to withdraw it from such liability, and thus retain the temporal ownership without its incidents? This would be a startling proposition to affirm. It would revolutionize the credit system entirely, destroy all faith in the apparent ownership of property, and repeal all statutes and decisions against frauds. Every man about to engage in business, where there was a chance of loss, would put himself under the pupilage of trustees, and everybody's estate would be passing under settlement deeds and trustees' accounts through the courts before in the natural course of things the jurisdiction of the orphan's court would attach.

"Such consequences from judicial decision need not be deprecated in advance, for they can never occur. * * * Chancellor KENT, vol. 4, p. 311, of his Commentaries, states the law of such an attempt thus: 'The policy of the law will not permit the ownership of property to be so limited as to remain in the grantor for life, free from the incidents of property, and not subject to his debts.' So, in *Johnson* v. *Harvey*, 2 Penna. Rep. 82, GIBSON, C. J., states the same thing to be law, and the reasons for it, viz.: 'That the statute of 13 Eliz., which proposes to avoid conveyances with intent to delay, hinder or defraud creditors, would be of little use if a debtor might put his estate beyond the reach of creditors, and still *get a living from it*. He puts it on the statute of 13 Eliz. as void."—Mackason's Appeal, 42 Penna. St. 330.

A grantor, solvent, unembarrassed, and out of debt at the time, conveyed nearly all of his property upon the following trusts:

First—For the use of the grantor and his wife during their joint lives; remainder to the survivor for life, with power, by them jointly or by him solely, if he survived her, to dispose of it absolutely.

Second—Whether he survived her or not, then, in default of appointment to such person or persons, as by the laws existing at the date of the trust, would be his heirs. Held, void as against creditors, both existing and subsequent, because of the trusts in the deed.

The grounds of the decision are thus stated by the chancellor:

"The whole interest, then, of the wife is an interest in common with her husband during their joint lives, or for her own life, in case she survived him. But no power of disposition is reserved to her independently of her husband, whilst to him, after her death, such power, in the fullest manner, is given, either by deed or will; and in case he fails thus to dispose of the property it descends to his heirs at law. It appears to me that such a deed is clearly fraudulent and void, both with reference to pre-existing and subsequent creditors.

"It cannot be regarded as a conveyance made by a husband in favor of his wife, which, if *bona fide*, will be permitted to stand against subsequent creditors; but it is a conveyance made by a party for his own benefit, and, although his wife was designed to participate with him to some extent in the enjoyment of the property, the beneficial interest of the husband greatly preponderated over hers. It is emphatically a deed for the use of the grantor, which renders it void against all creditors, existing or subsequent."

Brenton v. *Hock*, 3 Mich. 477.

In *McIlvaine* v. *Smith*, 42 Mo. 45, the trust declared was to pay over to Smith, the grantor, the net income of the property during his life. Any attempt on his part to anticipate the income of any quarter by drawing upon the trustee, or otherwise, was to work a forfeiture of the income for that quarter. After Smith's death the property and the funds remaining in the hands of the trustee were

to go to Smith's children. He reserved the power of appointing the respective shares among his children, and, on failure of issue, he might appoint to whom he pleased.

Smith, having no seizin, "no power to dispose of any "estate in the land, or to enjoy the occupancy, nor to call "upon the trustees for a conveyance to himself," it was held that he had no interest in the land which could pass under a sheriff's sale. The remedy, if any, it was held, was in equity, where the creditor might have the rents and profits applied as they accrue to the satisfaction of the debt.

The court say:

"The property is of such a nature that it cannot be reached at law, but it is quite a different thing in equity. Here is an attempt of a man, apparently, to tie up his own property under a trust in such a manner that himself, as owner, may enjoy the income, and set his creditors at defiance. This is a thing which the law does not allow. A man cannot own property and not own it at the same time. Whatever might be said of the justice and honesty of the thing in point of morals, it is enough that such an arrangement is in contravention of the rules of law and equity. He cannot be permitted to have the beneficial enjoyment of an income of this nature beyond the reach of his honest debts."

A case somewhat similar to the last was *Pacific National Bank* v. *Windam*, 133 Mass. 175. There, also, it was held that where the debtor is the founder of the trust for his own benefit, a provision against anticipation is invalid against the claims of future creditors.

What is the effect of these decisions? Do they concern a mere matter of form in conveyancing, or, do they establish a rule of property, founded upon a broad principle of justice and equity? If the latter, then they must mean that a man is at all times under an obligation to pay his debts and to apply all of his property to their satisfaction; and that he cannot escape from or evade this obligation, by any tricks of conveyancing, nor by any other artifice whatever; that he cannot give his property away from his creditors, present or future, while retaining the use and

dominion of it to himself. If by a merely nominal transfer to a third person, reserving to himself an absolute power of disposal, he can place his property beyond the reach of future creditors, of what use is it to deny him the right to create a trust for his own direct benefit, with the same effect? What is to be gained by forbidding him to do that directly which he is permitted to do indirectly?

Where property comes originally from the beneficiary the rights of future creditors are very different from what they are when the trust for his benefit has been created by another. In *Pacific National Bank* v. *Windram*, already cited, this distinction is pointed out. Where the founder of the trust is a person other than the debtor, he may impose restraints on the power of the *cestui que trust* to alienate the trust property and protect it from his creditors. Creditors of the beneficiary have, it is said, no right to complain that the founder of the trust did not give his property for their benefit, or that they can not reach a greater interest in the property than the debtor has or *ever had*. But when a man creates a trust for his own benefit, with a provision against alienation, he undertakes to place his property beyond the reach of creditors while he retains the beneficial use of it; "he transfers only a portion of his interest, retaining in himself a beneficial interest, which he attempts, by his own act, to render unalienable by himself, and exempt from liability for his debts."

Does not the same reasoning require a similar distinction to be be made as to the rights of creditors between a case where a power over property is *conferred* upon the debtor, and one where the power is *reserved?* There is some ground for treating a power *conferred* simply as an offer of the property to the donee, which he is

at liberty to accept or reject at pleasure; and for holding that no title can vest in him before acceptance. The donor, it may be said, did not give his property for the benefit of the creditors of the object of his bounty, and until the latter has made it his own by acceptance, they have no claims upon it. But a power *reserved* is a different thing. To call such a power an offer by the grantor of his own estate to himself, would be absurd. It is nothing more nor less than a retention of the old dominion—the old ownership. A gift with such a reservation is merely testamentary. It is a mere expression on the part of the donor as to who he intends shall have the property in case he makes no other disposition of it.

Jones v. *Clifton*, 11th Otto, 225, will probably be relied on by the other side. But that was a case depending upon peculiar circumstances and very different from the present. In the opinion delivered in the Circuit Court it is stated to have been proven that at the date of the deeds in question the husband was not engaged in trade; "that he did not contemplate engaging in trade or contracting debts; that he was an indiscreet young man, who, "though possessed of a large fortune, might squander the "whole in reckless gaming and dissipation; that the settlements were made at the suggestion of his more prudent "wife, and did not embrace more than one-sixth of his "estate.

2 Flippen, pp. 193 and 194.

Again on page 201 it is said that the reservation of the power had been explained. The husband contemplated removing to California, and reserved the power to enable him to change the investments to that State. He did not expect to exercise the power for his own benefit,

and was not aware that he could do so. "He only contemplated settlements in California to the same uses."

No interest other than that given him by the power was reserved to the settler and the estate was in the actual enjoyment of the wife at the time the assignee sought to appropriate it for the benefit of creditors. Under such circumstances a court of equity would be loth to take it away from her and would naturally be astute in finding some way to protect her interests. Without, however, conceding either that the case is in point or that it was correctly decided, appellants, with all deference, respectfully submit that the reasons given for the decision are not well grounded.

In the opinion delivered by Mr. Justice FIELD, it is in effect said to be "clear from all the authorities" that the reservation of a power of revocation in no way impairs or affects the validity of a voluntary settlement. The authorities cited in support of this proposition are, without exception, cases involving the validity of settlements as between the settler himself and persons claiming under them. That the rule in that class of cases is as stated in the opinion is conceded. The absence of a power of revocation is a fact requiring explanation, especially where the gift is unreasonable or improvident, and casts upon those claiming under the deed the burden of showing that the settler understood what he was about and intended that it should be irrevocable. But this does not prove that a deed containing such a power is good as against creditors. When the reason of the rule is examined, it will be seen to imply the reverse.

An English case, more recent than any of those cited by this court, in *Jones* v. *Clifton*, is *Henry* v. *Armstrong*,

17 L. R., Ch. 688. In that case, a bill was filed by the settler, to set aside a voluntary settlement.

Kay, J. says:

"I was told that, when he executed the deed, he was going into business on the stock exchange, and his object in executing the deed, which it is said was pressed upon him by his father-in-law, was to protect his wife and children. It is very common that a man should execute such a deed when he goes into business, and the ordinary way is, that the deed should be drawn without any power of revocation, because, if there is a power of revocation, and he falls into difficulties or becomes bankrupt, the assignment of his property would become practically useless. Such a power would, in this case, be entirely inconsistent with the object which I am told the plaintiff had in executing the deed. Then it was said, there might have been a power of revocation with the consent of the trustees but in what conceivable circumstances could such a power be exercised? The settler had a wife and children who were the objects of the settlement, and it would be impossible for the trustees, if they did their duty, to have it revoked in the slightest particular. Any such a power would be an idle thing in such a settlement as this."

Mr. MAY, on page 451 of his work on fraudulent conveyances, says:

"A power of revocation in a settlement is, as we have seen, a great element of fraud against third persons, whether creditors or purchasers; but, on the other hand, in questions relating to frauds between the parties to a voluntary settlement, the *absence* of a power of revocation is a circumstance which always requires clear proof that the donor deliberately, and with full knowledge of the consequences refused to have the power inserted."

Davidson on Conveyancing, vol. 3, title Settlements, page 695, has already been quoted as saying that a voluntary settlement revocable at the pleasure of the settler, or with the consent of a person "nominated" by him and "at his devotion," would be *ipso facto* fraudulent as against creditors under the statute of 13 Eliz.

The same author, on page 695 of the same volume, says:

"Voluntary settlements are mostly executed with a view to their having a *quasi testamentary operation* and being revocable, if the settler should desire to make other dispositions; and the draftsman receiving instructions for an instrument of this kind should, therefore, provide for the revocation of the settlement, unless he is satisfied that it is the settler's wish to make it irrevocable. In many cases voluntary settlements, in form irrevocable, have been treated as revocable, or set aside, on the ground that a power of revocation ought to have been inserted."

In *Wallaston* v. *Tribe*, 9 Eq. 44, cited in *Jones* v. *Clifton*, it was held, that "trusts in favor of the children "of a future marriage, and of collaterals, are purely vol- "untary, and if not subject to revocation when not meant "to be irrevocable, may be set aside by the donor." The Master of the Rolls, speaking of the motives which might have prompted the execution of the deed, says: "She "might very well think: "I wish it to be given to them; "and if I do not change my mind, *this will save me the* "*trouble of making a will.*"

And, in *Jones* v. *Clifton*, Judge BALLARD, in the course of what this court very justly pronounces "the "very able and learned opinion of the district judge, who "presided in the Circuit Court when the case was heard "there," says:

"Some chancellor has intimated that a voluntary settlement partakes very much of the nature of a last will, and should be scarcely less revokable."

The learned judge seems to think this was going too far, but it is not much beyond the point to which many of the decided cases have carried the doctrine.

Such being the intention with which instruments of this sort are usually executed, there seems to be a very good reason why, as between the donor and the donee, the absence of a power of reservation should be consid- ered as a circumstance requiring explanation. But why a voluntary deed *containing* such a power, and thus car- rying on its face the evidence of its testamentary charac- ter, should be permitted to stand in the way of creditors, is not apparent. Whatever may be thought as to the resemblance between a voluntary settlement, as such, and a last will, there can be no doubt of the strong resem- blance between them where the settlement is, in terms, revocable at the mere will of the settler. The latter can

do with the settled estate whatever a testator can do with the property devised, and there is no valid reason why property in one situation should be less liable for the debts of its real owner, than that in the other.

Jones v. *Clifton* appears to rest entirely upon authority. The cases cited and relied on do not support the doctrine announced, which appellants submit is opposed to the decided weight of authority. On the authorities cited, it is further submitted that in a voluntary deed, valid as against creditors, only a limited power can be reserved; such as a power to appoint to or among the objects of the trust; or to appoint to whom the donee pleases on the happening of an event provided for; as, upon failure of issue, or on the failure of some other defined object of the trust; or else the exercise of the power must be made to depend upon the consent of third persons, who will exercise a discretion as to what the circumstances require, independent of the settler.

IV.

THE JUDGMENT WAS A LIEN ON FORSYTHE'S ESTATE IN REVERSION WHICH, ON THE REVOCATION OF THE TRUSTS DECLARED IN THE DEED TO ARTHUR, BECAME ABSOLUTE.

An estate in remainder or reversion is liable to sale on execution, and is therefore subject to the lien of a judgment.

Williams v. *Armony*, 14 Mass. 20.
Kelley v. *Morgan*, 3 Yer. 437.
Lockwood v. *Nye*, 2 Swan, 515.
Wiley v. *Bridgman*, 1 Head, 68.
Kickey v. *Hilman*, 2 Halst. 180.
Burton v. *Smith*, 13 Peters, 464.
Tyndale v. *Ware*, 3 Jacobs, 212.
Smith v. *Angell*, 2 Lord Raym, 733.

In *Burton* v. *Smith*, the lien was held to result from the right to take out an *elegit*; that the lien attached to a reversion after a life estate, and that where in consequence of an outstanding life estate it is impracticale to obtain satisfaction of the debt by an application of the rents and profits, a court of equity would decree a sale of the reversionary interest.

Whatever interest may be sold and conveyed by the owner is subject to execution, and the sale and deed of the sheriff is as effectual as that of the debtor would be. Otherwise a man by carving up his real property into estates, uncertain as to duration and the time of vesting in possession, might protect it against the claims of creditors.

In *Lockwood* v. *Nye*, the court, speaking of the alleged sacrifice involved in sales of such interests upon execution, says:

"This is not to be presumed; on the contrary, we are to presume that it will sell for its reasonable value, which can in most cases be easily ascertained. Besides, the argument will apply as well to every forced or judicial sale, where property is sold to the highest bidder. Why may not the value of an interest in remainder be known and given as well at a forced, as at a voluntary sale? A debtor may, indeed, vest his entire present funds in the purchase of a remainder. Shall he be allowed to hold it to the prejudice of the creditor?"

And in *Tyndale* v. *Ware*, 3 Jacob, 212, the Master of the Rolls, in answer to a similar objection, said:

"But I think such considerations ought not to weigh, for the question is, to whom does the property belong? It is not the habit of the court to consider the interest of the heir when opposed to that of the creditors. They ought to have the fullest remedy. And upon what principle can the court refuse to give them the benefit of a sale because another person, whose interest is secondary and entirely subject to theirs, may be benefited by delay?"

To which, after quoting the above, this court, in *Burton* v. *Smith*, add:

"So far from its being proper for a court to hesitate about decreeing the sale of an interest because it is reversionary, we think that the character of the interest affords a stronger reason. For, in regard to property in present actual possession, the *elegit*, although a tardy remedy in its operation, yet is in some

degree an effective remedy, inasmuch as the creditor will by that means annually receive something toward the payment of his debt; whereas, in the case of a dry reversion, as the one in the present case is, if the outstanding life estate should continue during half a century, the creditor might look on in hopeless despondency without receiving one cent from that source, except through the interposition of a court of equity in decreeing a sale."

In *Smith* v. *Angell*, 2 Lord Ray m. 733, a reversion in fee expectant on a term of years, was held to be assets in the hands of the heir, although the term was to continne five hundred years. And in *Tyndalle* v. *Ware*, above quoted, it was held that a reversion after an estate tail, limited to unborn children, was bound by a judgment against the ancestor from whom it descended.

The vesting in possession of the reversion in that case, depended upon the same contingency as that of Forsythe in this. Besides, Forsythe had a vested intermediate estate for life in remainder, and a power with the consent of his wife to revoke all the trusts of the settlement.

The trusts in favor of the children of Leonard E. Forsythe and of Lydia T. Wrarick, were void for remoteness.

The property was to go to the posterity of Robert, if he had any; if he had none, or if his posterity, at any remote period of time should become extinct, then it was go to the chidren of the persons named. The words "dying without issue" import an indefinite failure of issue and a limitation upon such a condition, is void within the rule against perpetuities.

Barlow v. *Salter*, 17 ves. 479.
Conkling v. *Conkling*, 3 Sand. ch. 64.
Anderson v. *Jackson*, 16 Johns. 382, and cases cited.

At common law a conditional fee, determinable upon the donee's dying without issue, would not support a remainder. But when the statute *de donis* took away the power of alienation on the birth of issue, the estate of the tenant in tail came to be regarded theoretically as an estate for life, which was certain to have a natural termination at his death. And it was held that a remainder might be limited to take effect at his death without issue. As a recovery suffered by the tenant in tail would bar such limitation, as well as the estate tail, there was no danger of a perpetuity. But, by the Illinois statutes, estates tail are converted into fee simple estates which do not admit of a remainder.

Moreover, the trusts in favor of those children was not a remainder, but a shifting use which the law never permitted to be limited after an estate tail, or what is the same thing, a dying without issue. They were to take effect not after the expiration of the estate of Forsythe's issue, but in derogation of it. Upon the birth of children to Robert, the remainder in fee would vest in them, but, on their death without issue, the estate, instead of going to their heirs, would go to the children of Leonard Forsythe and Mrs. Warwick. Even if the words "dying without issue" be construed to mean issue living at the death of Robert, the property, after vesting in his children, would, if they did not survive him, go to the other children under the deed. In that case the limitation would be void as an attempt to mount a fee upon a fee, the last to take effect, not as a substitute for the first, if that should fail, but after and in derogation of it.

Forsythe, then, besides his life estate and the power, had a reversion in fee. The power to appoint new uses included a power to revoke the old. An appointment to

Forsythe could not legally operate as such, because, on the uses declared by the deed being revoked, the use would instantly revert to, and be executed in himself, and nothing could be added by the conveyance.

However this may be, it is true that, as a matter of fact, the power of *appointment* was exercised only in part, if at all; for the conveyance to Corwith, though in form, absolute, was by way of mortgage, and no other uses were declared, as required by the terms of the power.

To what extent was the power of *revocation* exercised? If, as will be claimed by appellees, the uses of the settlement were revoked *in toto* so as to cut off the lien of the judgment on the life estate, what was the effect as to the reversion? Precisely the same as though such uses had ceased and determined by express limitation contained in the deed creating them, as well as the power; or by the happening of an event on which such uses had been expressly limited. The exercise of the power was one of the means provided in the deed for defeating the uses therein declared. Had there been an appointment to a purchaser for value, the new use would have taken effect as though inserted in the original deed instead of the power. So, on the exercise of the power of revocation, so much of the use as was not appointed, returned to Forsythe in the same manner and with the same effect as if the uses of the settlement had been divested by the happening of any other event, by which their extent was to be determined. The judgment bound the interest of Forsythe. The reversion, after the revocation, was bound from the date of the judgment, as effectually as though the trusts had expired by original limitation, or for any other cause contemplated in the deed creating them.

V.

COCHRANE NOT ENTITLED TO PROTECTION AS A BONA FIDE PURCHASER.

An estate for life is, in express terms, given to Forsythe in the deed to Arthur, under and through which Cochrane claims title, and of the contents of which he is conclusively presumed to have knowledge. Besides, the deed being duly recorded, the record imparted constructive notice of its contents, as did also the record of the judgment in respect to the judgment lien. It also appears that he had actual notice both as to the deed and the judgment; since, as he alleges, an abstract of the title was furnished him prior to the loan. In his cross-bill he denies *definite* notice or knowledge of the judgment, giving as a reason the destruction of the record in the great fire of October, 1871. This, of course, would not affect the constructive notice imparted by the record, even as against subsequent purchasers; and how it could prevent him or his agents from obtaining *definite*, actual notice at the time of the loan, which was nineteen months before the fire, is not stated.

At and prior to the loan he had actual notice, also, of the character of the conveyance to Corwith; that the latter received and was holding the property only as security, and was to convey to Forsythe on payment of the debt.

Wright, agent of, and witness for, Cochrane, testifies that at the time of negotiating the loan he understood that the major portion was to pay an indebtedness from Forsythe to Corwith, and that Corwith held the title, and would hold it till he got his money. His impression is, that about ten thousand dollars went to Corwith (*Record*, *p.* 87).

And Forsythe, witness for appellees, testifies that Wright and Tyrell, agents who negotiated the loan for Cochrane, were aware that he required the money to redeem the property (*Record, pp. 77 and 78*). His best impression was, that half the net amount received on the loan, or about seven thousand dollars, went to Corwith, and the balance to himself (*Record, p. 77*).

Cochrane's position was not improved by the foreclosure and sale to Wallace. That was a mere matter of form—a sham contrived by John Forsythe in the interest of Robert, and carried through for the sole purpose of cutting off appellant's claims with no intention of barring the equity of redemption.

Wright testifies that John, in order to save for his brother Robert, "what there was over and above the debt," proposed to find a purchaser for the property, if Cochrane's agent would advertise it under the trust deed; the new loan to run five years without commission, and to be for seventeen instead of fifteen thousand dollars. "He, (John) said that the best way to cut off all other claims, would be to have a sale made under the trust deed, and he said he would have James D. Wallace purchase the property at the sale, provided we would make a new loan of seventeen thousand dollars. There was no money to be paid at the sale. It was simply an adjustment or re-"arrangement of the security, and the inducement for it "was this: That he would put in two additional lots as extra "security, upon which there was no cloud, and in addition, "that he would guarantee the payment of the principal "note, and of each of the interest notes that should be "made by said Wallace, at maturity." (*Record, p. 87.*)

The sale and deed to Wallace was made under this arrangement (*Record, p. 88.*)

Tyrrell, a witness for Cochrane, speaking of John Forsythe's part in the transaction, testifies: "He re- "marked that he wanted to save something for Robert out "of that property. He further said, that he had some "little claim against the property for taxes; but in this "arrangement that would be cleared up; that he would "attend to that personally himself. He said that there "was also a suit pertaining to the title, to a portion of "the property, but claiming that his attorneys were "attending to it, and he would have no difficulty in quiet- "ing the whole title, and would do so." (*Record, p. 92.*)

The property was to be charged with the expense of quieting the title. (*Record, p. 92.*)

The amount due on the old loan at the time of the sale being $16,700 (*Record, p. 34*), and the notes and trust deed being for $17,000, it is likely that the difference was to cover this expense or part of it.

Interests of third persons, no matter whether prior or junior to the first trust deed given to secure Cochrane, were not, and could not, be affected by such a proceeding. Its invalidity attaches to the second trust deed and to the foreclosure of it. The last proceeding, if regular, would not bar appellant's rights, even if they were junior to those of Cochrane.

To sell while a cloud was hanging over the title, and especially during the pendency of a suit for an adjustment of the rights and equities of appellant, was an abuse of the discretion confided to the trustee. Instead of having a sale and then coming in, Cochrane should have made himself a party before.

Lane v. *Tidball*, 1 Gilmer, 130.
Gray v. *Hancock*, 1 Rand, 72.

James v. *Gibbs*, 1 Patt & Heath, 277.
Gibson v. *Jones*, 5 Leigh. 370.
Miller v. *Argyle*, Ibid. 460.
Wilkins v. *Gordon*, 11th Ibid. 547.
Peck v. *Peck*, 9 Yer. 301.
Hunt v. *Bass*, 2 Dev. Eq. 292
Johnson v. *Eason*, 3 Ired. Eq. 330.

Moreover, there is no evidence as to the regularity, of the proceeding or even that a deed was executed to Cochrane by the trustee. The onus was upon him to prove both of these things.

Gibson v. *Jones*, 5 Leigh, 370.
Norman v. *Hillis*, 2 Patt. & Heath, 676.
Wood v. *Lake*, 62 Ala. 489, and cases cited.

Cochrane is not entitled to protection as a *bona fide* purchaser, for the further reason that in his answer he admits that the property was originally purchased by Robert Forsythe with his own means, and does not aver want of notice of that fact at the time of making the loan. This he was bound to do, if he relied upon the *bona fides* of his purchase, either as a defence or as grounds for relief, in the cross bill, although notice was not alleged in the original bill. It was also incumbent upon him to support the averment by proof.

Boone v. *Childs et al.* 10th Peters, 178, and cases there cited.

Finally, it is submitted that for the reasons before stated the equity of redemption was not barred by the forclosure proceedings; and that even if entitled to priority for the whole of his claim, Cochrane, having no

title, but a lien only, would be required to account for the amount realized out of his security on the lots not in question, as well as for the rents and profits of the premises in controversy.

Respectfully submitted,

JOHN S. MONK,

For Appellant.

IN THE

Supreme Court of the United States.

ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD ET AL.,
APPELLANTS,

vs.

JOHN COCHRANE, JAMES D. WALLACE, ROBERT FORSYTH and JOHN FORSYTH,
APPELLEES.

NO. 92.

BRIEF AND ARGUMENT FOR JOHN COCHRANE,

ONE OF THE APPELLEES.

GEORGE W. SMITH,
EDWIN F. BAYLEY,
Counsel for Appellee Cochrane.

BARNARD & GUNTHORP, LEGAL PRINTERS, 104 RANDOLPH STREET, CHICAGO.

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ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD ET AL.,
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vs.
JOHN COCHRANE, JAMES D. WALLACE, ROBERT FORSYTH and JOHN FORSYTH,
APPELLEES.
No. 92.

STATEMENT.

In the year 1861 Robert Forsyth, being then free from debt and financially responsible to the amount of $20,000, purchased the lots which, with the buildings since erected, are the subject matter of this controversy, for $55 per foot, making the sum of $4,125. The lots had an aggregate frontage of 75 feet upon Prairie avenue, in Chicago, and a depth of 150 to 160 feet. The purchase was made from Ezra L. Sherman, but the title stood in the name of Horatio G. Loomis, as trustee for the latter.

Forsyth, to carry out the intent of his purchase, caused

a conveyance, dated March 30, 1861, to be made from Loomis to William R. Arthur, as trustee.

Rec., pp. 70, 90.

The trusts declared by this conveyance were that Arthur should permit Mary E. Forsyth, then the wife of Robert Forsyth, "to use and occupy, enjoy and receive "the rents and profits of said lands and premises for her "life, and to her own use, and at any and all times, upon "the order and request in writing of said Mary E. For- "syth and the said Robert Forsyth jointly, to convey "said lots, or either or any part of them, to such persons "as they may designate," and in case said Mary should die without issue in the lifetime of Robert, to convey said lands to Robert for life and to his lawful child or children in remainder. If Robert, having survived Mary, should then die without issue, the land was to go to the children of Leonard Forsyth and Lydia Warrack. If Robert should die without issue, leaving Mary surviving, then Mary was to have a life estate, and the children of Leonard and Lydia the remainder.

The conveyance contained the further clause: "But "if hereafter said Robert shall have child or children "born of his said wife or of any future wife, then instead "of the conveyance" to the children of Leonard and Lydia, "said trustee is to convey said lands to said Mary "E., or to said Robert (as the one may chance to survive "the other), to her or his use for life as aforesaid, and to "the child or children who may be so born to them or "him in fee simple."

Rec., p. 6.

Robert Forsyth built a house, barn and conservatory upon the premises. His wife and he resided upon

them from 1861 until her death in 1869. Robert continued to reside upon them until the spring of 1870, when he leased to Silverman, who occupied them until the first day of May, 1871.

Rec., pp. 70, 75, 77, 89, 90, 96.

In or about February or March, 1865, Robert Forsyth and George T. Brown agreed upon the terms for the formation of a partnership in the commission business at Chicago. Forsyth says the terms were not carried out, and that there were no written articles of partnership. On April 25, 1865, Forsyth published a notice of dissolution of the partnership. Brown seems, however, to have carried on business under the name of Forsyth & Brown. Forsyth was during the time actually engaged as freight agent of the Illinois Central Railroad Company, and does not appear to have taken upon himself any part of the business of Forsyth & Brown.

Rec., pp. 69, 70, 73, 78, 97, 98.

In September, 1865, Brandies and Crawford, of Madison, Indiana, having had a series of like transactions, beginning July 29, 1865, with Forsyth and Brown, advised Forsyth and Brown to purchase for them grain of the value of nearly $10,000. Forsyth and Brown thereupon made a draft for about $10,000 upon Brandies and Crawford, which was paid.

Crawford says: "We had no transactions with them, "except we would send them orders to buy wheat for us, "and after making a purchase we either remitted or they "drew on us at sight for money, which transaction was "closed up as we went along." It seems, however, the account was running.

Rec., pp. 67, 73, 80.

None of the wheat to which Brandies & Crawford supposed the $10,000 draft had reference was received by Brandies & Crawford. This was the last draft paid, and upon a statement of account Forsyth & Brown appeared by the books of Brandies & Crawford to owe them $9,814.55. Suit upon this account was brought in the United States Circuit court in Chicago, and judgment was recovered thereon against Forsyth, and also Brown, in March, 1866, for $9,665.49.

Rec., pp. 23, 57, 58.

Forsyth knew nothing of this transaction until suit had been or was about to be brought.

Rec., pp. 69, 74, 95.

A creditor's bill was filed upon the judgment, but it does not appear what was done with it.

Rec., p. 63.

On March 26, 1868, Robert Forsyth was adjudicated a bankrupt, and on July 26, 1868, was discharged. The Brandies & Crawford judgment debt was scheduled, but by mistake their residence was given at Pittsburgh.

Rec., pp. 25, 95, 62, 76.

Proceedings to take testimony, with a view to set aside the discharge, were instituted by Brandies and Crawford, and would seem to have been partially pursued and abandoned. The discharge was never annulled.

Rec., pp. 64, 96.

In 1869 a bill was filed in the State court, at Chicago, by Loomis and Forsyth and wife, and against Arthur and others, to correct the deed of March 30, 1861, in so far as to declare that the term "convey" in the power of appoint-

ment in that deed should be held to authorize or mean to convey in fee.

Rec., pp. 7, 8.

This proceeding, in which a decree in accordance with the prayer of the bill was rendered on or before November 6, 1869, may be referred to in order to fix the period for the operation of the appointment which was made in pursuance of the power on November 3, 1869.

On the last mentioned day Robert Forsyth and Mary E., his wife, joined in a request in writing, and served the same upon Arthur, by which they required Arthur, as soon as the decree of correction should be entered, to convey the premises to Nathan Corwith.

Rec., pp. 8, 42.

Mrs. Forsyth died in the latter part of 1869, or early in 1870, leaving no child, and leaving her husband surviving.

Rec., p. 72.

After her death, Arthur executed a deed of the premises, dated January 4th, 1870. This deed recited the request and purported to be made in pursuance of the deed of Loomis and the decree.

Rec., pp. 8, 9.

The original bill of complaint charges that "on or "about November 3, 1869, the said Robert Forsyth and "Mary E. Forsyth directed in writing that the said "Arthur should convey the said premises to Nathan Cor- "with in fee simple absolute. And thereupon the said "Arthur as such trustee, in pursuance of the trusts of "such original and reformatory deeds, on the 4th day of "January, 1870, did make, execute and deliver unto the

"said Nathan Corwith a conveyance in fee simple of all "and singular the said property aforesaid, which was "duly recorded in book 553 of Cook county records, "page 274."

Rec., pp. 3, 4.

This allegation is admitted

by James D. Wallace's answer, Rec., 12;
by Robert Forsyth's answer, Rec., 16;
by John Cochrane's answer, Rec., 23.

The original bill further charges that the *conveyance* was intended only "as a mortgage, and was made and "received with the distinct understanding and agreement "that when the said Corwith should receive the full pay-"ment of said indebtedness to him that he would reconvey "the said property in fee simple to Robert Forsyth."

Rec., p. 4.

The defendant Wallace calls for proof of this allegation, but Forsyth denies that the conveyance was intended as a mortgage to secure the payment of any sum, "with "any understanding that upon the payment of such in-"debtedness or any indebtedness the said Corwith should "convey such premises" to said Forsyth as alleged in the bill.

Rec., pp. 12, 16.

The answer of Cochrane admits but upon information and belief, that the conveyance was made as security for indebtedness of Forsyth to Corwith, but nothing more.

Rec., p. 23.

Forsyth, who is the sole witness upon the subject, testifies that the property was conveyed to Corwith to se-

cure him for money that he owed him, and that no arrangement was made for reconveyance; that the agreement was, if he became able he was to purchase it back; that he could not tell whether he should purchase it back for himself or "for whom," and that there was no agreement that the property should be reconveyed in payment of the money; that he made the arrangement with Corwith for the deed from Arthur to Corwith, and owed him $7,000 or $8,000, and was security for about as much more, making $16,000 or $17,000; that there was no arrangement as to the sum of money to be paid Corwith; that, excepting the security debt, the indebtedness was an indebtedness which accrued *after* the bankruptcy proceedings of 1868.

Rec., pp. 71, 76, 77.

There is no testimony showing that any agreement or understanding was had with Corwith, at the time the request of November 3, 1869 was made; nor that Mrs. Forsyth had any knowledge of or was a party to any understanding between Corwith and her husband concerning his indebtedness. The arrangement or understanding, of whatever scope it might have been, was made with reference to the execution and delivery of the deed of January 4, 1870, according to the language and proper interpretation of all the testimony. This was the allegation of the bill, and so was the answer of Cochrane.

The deed from Arthur to Corwith, dated January 4th, was recorded March 15, 1870.

Forsyth had been then for some time negotiating with Wright and Tyrrell, agents at Chicago of appellee Cochrane, for a loan of $15,000. An abstract of title

had been submitted to Walker, Dexter & Smith, attorneys, for examination, with whom also had been left the deed from Arthur to Corwith, and a deed from Corwith and wife, dated March 12, 1870. That firm reported the title good in Forsyth.

Rec., pp. 98, 99.

Thereupon a deed of trust, bearing date March 10, 1870, to George Scoville, and made to secure the payment of $15,000 in five years, with 9 per cent. interest, payable semi-annually to appellee Cochrane, executed by Forsyth, was delivered to Wright & Tyrrell.

Rec., pp. 4, 24, 84, 86.

These deeds were placed upon record by Wright & Tyrrell on March 15, 1870.

Rec., p. 85.

The sum of $15,000 advanced by Cochrane, less the commissions of Wright & Tyrrell and expenses, the net amount being upwards of $14,000, was then paid over, and one half or more of it was at once paid to Corwith, Forsyth retaining the remainder.

Rec., pp. 77, 87.

Cochrane had nothing to do personally with any of these transactions, and Wright & Tyrrell at that time knew nothing of any claim on the part of Brandies & Crawford.

Rec., p. 87.

The rent, until May, 1871, under the Silverman lease, was paid to Wright & Tyrrell.

Rec., pp. 77, 89.

Brandies and Crawford, on May 9th, 1870, but without

the knowledge of Wright & Tyrrell, caused an alias execution to be issued upon the judgment recovered in 1866. The original bill alleges that on the 9th day of May, 1870, they caused an alias writ of fieri facias to be sued out upon their said judgment against said Forsyth and Brown, and directed to the marshal of the northern district of Illinois, and that the marshal having levied "on the said property so conveyed to said Forsyth," did proceed, on the 7th day of June, 1870, to sell the same, and that the same was purchased by Brandies and Crawford for eleven thousand and six hundred dollars: that no redemption having been made, the marshal on the 9th of September, 1871, made to Brandies and Crawford a deed of the premises.

Rec., pp. 4, 87, 95.

The cross-bill of Cochrane alleges that the claim of Brandies and Crawford arises upon this asserted sale by the marshal.

Rec., p. 37.

The purchase was made by one of the firm.

Rec., p. 64.

Brandies and Crawford caused possession to be taken by force just before the fire, which occurred October 9, 1871, or soon after the execution of the marshal's deed, or as the bill alleges on September 10, 1871. The house had been closed by Forsyth and was broken in; the testimony on this point is that of Forsyth alone, and sustains Cochrane's answer.

Rec., pp. 24, 70, 75.

Possession was recovered by a suit in forcible entry and detainer in or after May, 1872.

Rec., p. 78.

Robert Forsyth defaulted in the payment of the instalments of interest due to Cochrane on September 10, 1871, and March 10, 1872.

Rec., p. 85.

About this time, John Forsyth, on behalf of Robert, interceded with Wright & Tyrrell, and they learned from him for the first time that Brandies and Crawford made a claim against the property.

Through John Forsyth an arrangement was made for a loan of $17,000; and the premises were sold to James D. Wallace, under the power given by the trust deed of 1870.

Wallace made a trust deed dated April 17, 1872, and recorded April 22, to Scoville to secure the payment of $17,000 in five years, with nine per cent. interest, payable semi-annually, and which conveyed not only the premises embraced in the former trust deed, but two whole and a fraction of one other lot adjacent, making an additional security of fifty feet frontage by like depth, or one hundred and twenty-five feet in all.

John Forsyth guaranteed the payment of the notes. He stated that he had paid taxes for Robert, and would continue to see that the taxes upon the mortgaged premises should be paid.

He also stated that he had employed, or would employ counsel to remove the cloud covered by the levy and sale in the interest of Brandies and Crawford.

Rec., pp. 26, 87, 88, 92.

After this, and on May 27, 1872, Brandies and Crawford filed their original bill, to which James D. Wallace

and Robert Forsyth only were made parties defendant. Neither Scoville nor Cochrane was a party.

The bill was framed upon the theory that Brandies and Crawford having become the owners by virtue of the marshal's deed, and being in possession, were entitled to have their title quieted. It set out the title in Robert Forsyth as hereinbefore stated—the sale by Scoville, and the trust deed by Wallace, but offered to do or perform nothing by way of equity as regarded Cochrane.

It prayed that the deed from Scoville to Wallace should be annulled, and that Wallace and Robert Forsyth should be enjoined from interfering with complainant's possession.

No order of injunction was ever made.

Rec., pp. 1 to 6.

The answers, among other things, asserted the validity of the sale by Scoville.

Rec., pp. 11, 15.

The property so newly mortgaged depreciated very largely after 1873. The buildings became almost worthless.

Rec., pp. 90, 91, 94.

On May 1, 1876, default under the Wallace trust deed having occurred, and the sale having been duly advertised, Scoville sold them to Cochrane.

Rec., pp. 37, 89, 91, 93.

At that sale John Forsyth surprised Wright & Tyrrell by claiming a tax title.

Rec., pp. 89, 93.

On July 13, 1876, Cochrane, on his own petition, was admitted a party defendant to the original bill of Brandies & Crawford.

Rec., pp. 20, 21.

He thereupon filed his answer, and in October following a cross-bill, claiming title, and in the alternative, the right of subrogation to the rights of Corwith. He asked that his title be quieted.

Rec., pp. 23–30.

John and Robert Forsyth and Wallace, three of the defendants to the cross-bill, were defaulted.

Rec., p. 45.

Brandies and the representatives of Crawford, who had died, answered substantially in the terms of the original bill.

Rec., p. 46.

In August, 1876, Cochrane paid a large sum of money to redeem the premises from tax sales.

Upon hearing, the original bill was dismissed, and a decree was entered in accordance with the prayer of the cross-bill.

The opinion of his Honor, Judge Drummond, who heard the cause, will be found at pages 101 and 102 of the record.

Brief.

I.

Loomis, by the deed executed at the instance of Robert Forsyth, which may be termed a *post nuptial* settlement, made when the latter was not involved, and before the debt to Brandies and Crawford accrued or was contemplated, created a trust:

1. For the benefit of his wife during her life. Arthur was under a duty to permit her to enjoy the profits, and to prevent interference.

2. For the benefit of himself after her death, and during his life if he should survive.

3. For the benefit of his children, whether born of his wife Mary or a future wife.

4. For the benefit of the children of others, in case he should die, leaving no child or descendant.

Loomis held the fee, which was never in Forsyth, and by the deed it was vested in Arthur. He was to convey to Forsyth for life, if the survivor, and his children, or other children, as the case might be, in remainder, when Mary should die. The trust was subject to defeat by the joint act of Forsyth and wife.

A power, by way of appointment, not by himself alone but by his wife and himself was conferred. *The wife*

had an equal share in the power with him, and as full authority as he. The power was not divisible, descendible nor transmissible.

Cole v. *Wade*, 16 Vesey, 42, p. 46.
Jones v. *Clifton*, 101 U. S., 225.

The power was a right to designate the person or persons in whom the use should be executed. When the appointment should be made the statute of uses vested the estate in the appointee, if made in the terms of the power. Arthur was not to sell, receive, or reinvest the proceeds of sale, but to convey when the designation should be made.

So far as those claiming under the trust were concerned, the appointment might be made by way of gift, or by way of conveyance upon such terms or conditions as should operate for the benefit of Robert and Mary Forsyth or of either of them.

1 Chance on Powers, sec. 603, p. 228.
Dominic v. *Michael* 4 Sandf. (Supr. Ct.), 374, p. 410.
1 Sugden on Powers (3d Am. Ed.), * p. 12, ch. 1, sec. 3, sub. 2.
* p. 118, ch. 3, sec. 1, sub. 2.
* p. 229, ch. 6, sec. 1, sub. 1.
* p. 250, ch. 6, sec. 3, sub. 1, *et seq.*
Ladd v. *Ladd*, 8 Howard, U. S., 10.

The settlement was for the separate use of Mrs. Forsyth.

Story's Eq. Jur., sec. 1,382.
Perry on Trusts, sec. 648-9.

It was reasonable and proper.

Moore v. *Page*, 111 U. S., 117.

Mrs. Forsyth was not affected by the bankruptcy, nor did it extinguish the power as to Forsyth.

Jones v. *Clifton*, *supra*.

II.

No lien attached at the recovery of the judgment in 1866. He had no vested estate for life or in remainder, within the meaning of the statute concerning judgments.

Baker v. *Copenbarger*, 15 Ill., 103.

Even if Robert Forsyth had an interest under the settlement upon which a judgment would be a lien, such interest and necessarily the right of the lienor was divested by the appointment. The appellants not only do not question the appointment but expressly assert its validity.

The pleadings are that the power was duly executed.

III.

The bankruptcy of Robert Forsyth and his discharge in 1868 discharged the judgment.

Hennequin v. *Clews*, 111 U. S., 676.

Neither the pleadings nor record indicated anything as to a fraudulent or fiduciary origin. The tort, if any, was waived.

Shuman v. *Strauss*, 52 N. Y., 404.
Flannagan v. *Pearson*, 42 Tex., 1.
Palmer v. *Preston*, 45 Vermont, 154.
Wolcott v. *Hodges*, 15 Gray, 547.

The debt was not fiduciary nor fraudulent.

1. There is evidence that the grain was bought. The reason for its non-receipt is not shown. The proof is that appellants did not receive it, and they brought suit for the "proceeds."

2. There was a running account; and the judgment is not for the amount of the draft last drawn, nor for the amount claimed, but for a balance of a debit and credit account.

Test. Kiernan; Rec., 67.
Statement, *supra*.
Chapman v. *Forsyth*, 2 Howard, 202.
Grover v. *Clinton*, 5 Biss., 324.
Cronin v. *Cotting*, 104 Mass., 245.

Appellant's demand accrued after the partnership of Brown & Forsyth had been dissolved.

3. Forsyth was not a party to the transaction. If there was fraud he had no part in it.

The firm could not be a trustee; no act of one of its members could make the other a trustee without his sanction or participation.

Curtis v. *Waring*, 92 Pa. St., 109.

IV.

Corwith was not the mortgagee of Forsyth.

The understanding was a sale, or conditional sale, not a redeemable mortgage.

According to the testimony, when the conveyance was made Forsyth's obligation ceased. He gave Forsyth the privilege of buying at the sum of the debt, but there was no mutuality of obligation. Corwith had the title or the right of ownership irrespective of the indebtedness.

He voluntarily offered Forsyth an inducement to sell or mortgage the lands.

Jones on Mortgages, Sec. 265.
Peugh v. *Davis*, 96 U. S., 336.
Rue v. *Dale*, 107 Ill., 275.

The dominion or ownership was at least comprised in Corwith and Forsyth. By uniting in mind they could convey the fee, or could mortgage. They could also annex to a mortgage such powers and conditions as they saw fit. Wright & Tyrrell so understood.

Forsyth made the trust deed to Scoville and Corwith ratified it, by conveying to Forsyth and receiving a part of Cochrane's moneys.

Forsyth does not nor could he nor any one claiming under him complain of the sale made to Wallace under the power.

If appellants had the right to object to this transaction they should have done so before it was consummated.

They should have filed a bill before the rights of others intervened.

A purchaser of an equitable estate at execution sale takes it subject to all infirmities.

Maghee v. *Robinson*, 98 Ill., 458.

V.

Appellants are estopped:

By neglect to file a bill in 1870, and neglect to make Cochrane a party to the bill filed May 26, 1872.

Corwith was never notified of Brandies & Crawford's claim. Forsyth knew nothing of the levy until after it had been made.

Wright & Tyrrell were not notified in 1870 of the claim. They knew prior to April 17, 1872, of a claim, but the new trust deed was given before the bill was filed. During 1872, and until May, 1876, the suit was conducted without the knowledge of them or Cochrane.

Cochrane was allowed to bid in the property in May, 1876, satisfy his debt and discharge John Forsyth as guarantor without notice.

ARGUMENT.

I.

THE DEED OF 1861.

The Statute of 1845, Title Judgments, in force in 1866, declared that a judgment of a court of record should be a lien upon the real estate of the person against whom it should be obtained, and that real estate should include all interest of the defendant or any person to his use in fee for life or for years.

Under this statute, it was held in *Baker* v. *Copenbarger*, *supra*, that an interest in the proceeds of land to be sold under a will, and which was expectant upon a mother's dying without disposing of the land, was not subject to sale on execution.

The following are extracts from the opinion in *Baker* v. *Copenbarger* CATON, J:

"By his last will and testament, James Newell devised "the premises in question to his wife for life; then "the will proceeds: 'And at the death of my said wife, "all the property hereby devised or bequeathed to her as "aforesaid, or so much thereof as may remain unexpended, "be sold, and equally divided among my children, Martha "Copenbarger,' and four others, naming them."

* * * * * * *

"The question however, will still arise, whether the

"purchaser at the sheriff's sale will be entitled to receive "that portion of the money which by the will is devised "to William Newell. This depends entirely upon the "question whether he had any interest in the land which "was subject to be levied upon under the execution. If "the plaintiff in the execution had a right to levy upon "the land he had a right to sell it, and to convey a good "title in spite of the other devisees. This we have al- "ready seen he could not do. The reason of this is "obvious. A portion of the legal title had descended to "and vested in him, not as owner, but as trustee, to be "sold and the proceeds distributed according to the direc- "tions of the will, and that title was held as strictly in "trust as if he was to have no interest in the proceeds. "The land was not devised to him, but the money was, "His only claim of interest was in that money, and even "in that he had no certain interest till after the death of "his mother, who, by the will, was authorized to sell it. "The naked legal title, then, which he thus held in trust, "certainly could not be sold on execution at law. Could "his equitable title? That was derived solely from the "will. By the will he derived no title to the land, either "legal or equitable. The devise, as before suggested, "was not of the land, but of money. The bequest "was of money, not presently, but in expectancy, and "even then not certain, *but contingent upon his mother "dying without disposing of the land.* Till that event "happened, he had no certain interest either in the land "or its proceeds. After that event he had an expectancy "of money, but nothing more. There was even yet no "money due him under the will, nor could it become due "till it had been produced by a sale of the land. Till "then he could have no right to demand it of any one.

"The question then simply is, can an execution be levied, "not upon money present, nor even upon money presently "due and payable, but upon a hope or probability that "money may, upon the happening of some future event, "become due and payable to the defendant in the execu- "tion? The very statement of the proposition conveys "to every legal mind the most conclusive answer. We "are of opinion that the sale, under the execution, con- "veyed no title whatever, either in the land or its pro- "ceeds, as to any of the devisees."

The term "real estate," as used in the statute, and embodied in the revision of 1845 was novel and introductory of new law. By the same revision, title, "conveyances," "real estate," as used in that chapter, was declared to mean "lands, tenements, hereditaments" and "chattels "real." Livery of seizin, estates in joint tenancy, except in the case of executors and trustees, when not created in express terms, and estates tail, were declared abolished. Instead of becoming seized in tail the person to whom a conveyance in tail at common law should be made should be tenant for life, and the remainder should pass in fee to the persons who should take on the death of the first grantee. The statute also declared that where an estate should be limited to a child, "to "be begotten," such child, born after the father's decease, should take as if born in his lifetime, although no estate should be conveyed to support the contingent remainder after his death. The term "interest" in the chapter entitled Judgments, as used in the revision, meant a right presently existing, inherent in and growing out of the land, not an authority which might never be exercised, and which was personal in its

nature; nor a remainder dependent for enjoyment upon survivorship, whether vested or contingent at common law.

A power to appoint, is not such an interest. It is nothing which another can exercise or enjoy, is not alienable nor an incident of title or ownership.

But for illustration:

"Powers," says Sugden, "*before* the statute of uses were, "as we have seen, mere directions to the trustee of the "legal estate how to convey the estate; in truth, they "were future uses to be designated by the person to whom "the power was given; these, as they arose, equity com- "pelled the trustee to observe. * * *

"Powers after the statute still remained *as mere rights* "*of designation which* bound the conscience of the trustee, "and the estates to be created by force of them were still "clearly future or contingent uses. But when a power "was executed, or the person in whose favor the appoint- "ment was made became invested with the use, he in- "stantly gained the legal estate by force of the statute."

"A power is a mere right to limit a use."

Sugden, *supra*.

The bankruptcy had no effect upon the power.

The statute of 6 Geo. IV., C. 16, passed in 1826, gave to an assignee the right to exercise powers vested in his bankrupt.

The act of 1867 contained no similar provision. If a power was a trust as in the case where it involved a duty, bankruptcy did not affect it. Neither did it where its exercise was a matter of volition.

The case of *Jones* v. *Clifton* is decisive of this point, but inasmuch as counsel for appellant question its reasoning it may be well to refer to a few English cases cited by him.

Doe v. *Brittain*, 2 Barn. & Ad., 93, decided in 1818, was a case of a conveyance to A for a life with a *general* power of appointment, and remainder to him in fee in default of appointment. A became bankrupt and afterwards executed an appointment, which was held void.

This was a clear instance of proprietorship and dominion.

Hole v. *Escott*, 4 Myl. and Cra., 187, was decided in 1838, and arose upon an instrument executed in 1804. It followed *Badham* v. *Mee*. The latter case was overruled by *Jones* v. *Winwood*, 10 Sim., 10, which was decided in 1841, and arose upon an instrument executed in 1819. It will be noticed that all these cases grew out of the construction of instruments entered into before the statute of 6 Geo. IV. With reference to these cases Mr. SUGDEN says (1 Sugden on Powers, p. 83):

"If such a power cannot be exercised after the bankruptcy, the power of selection is gone, and in some cases, the immediate limitation over, in default of appointment, may be to strangers."

"In *Badham* v. *Mee*, the knot was rather cut than untied, for the appointment was to the eldest son in fee, and the limitation, in default of appointment, was to him in tail, so that much mischief was not done by the decision in the particular case, however injurious it may be, as establishing a false principle.

"But Badham and Mee has, since the publication of

"the foregoing observations, been overruled by the case "of *Jones* v. *Winwood*. There the estate was limited to "the *joint* appointment of the *husband and wife*, and in "default of appointment to the husband and wife successively for life, with intervening remainders to a trustee "to preserve contingent remainders, remainder to their "children in tail, remainder to the husband in fee. The "husband having become insolvent conveyed all his estates in the premises to the provisional assignee, who "conveyed to the particular assignee, and afterwards the "husband and wife appointed the estate under their "power to trustees in fee to sell, and it was held that the "power was not destroyed by the conveyance of the husband to the provisional assignee, which of course passed "his life estate and remainder in fee. The Court of Exchequer were of the opinion that the power might be "exercised so as to create limitations, which would apply "to the life estate of the wife and the estates tail of the "children, and which might legally have been introduced "into the original deed.

"They thought that the power was well executed, so "as to convey the estate for life of the wife, and the "estate's tail of the children to the trustees. They repudiated the doctrine laid down by Sir John Leach, in "affirming the certificate in *Badham* v. *Mee*. They did "not think it right to translate into words the effect of "the appointment under the power taken in conjunction "with the other circumstances, and then to consider "whether such limitations could, according to the peculiar rules affecting the transmission of landed property, "have been legally inserted in the original deed. The "utmost extent to which the principle could be carried "(and that might be questionable) would be to insert the

"limitations actually contained in the appointment itself in "the original deed, and then to examine whether such "limitations would be repugnant to any known rule of "law. Now, here there would have been no incongruity; "a fee would have been given the trustees, and no more. "But then, as the husband had previously, by an inno- "cent conveyance, conveyed away his life estate and his "reversion in fee, he could not derogate from his own "previous conveyance, and, therefore, the deed did not "operate on the estates previously assigned.

"The expression in the judgment, that the execution of "the power carried the estate for life of the wife and the "estates tail of the children, must be understood to mean, "not that the appointee took those very estates, but, on "the contrary, that the appointment defeated those es- "tates, and the appointee took the estate appointed to him "during such time as those several estates, if not defeated, "would have endured."

He refers to *Hole* v. *Escott* as a later case, which evidently it was not. It is possible it was later reported.

The power given by the deed of 1861 belongs to a class of powers recognized in England and America, and most frequent instances of which are found in antenuptial agreements made before the passage of Married Women's Acts, and by which it was sought to preserve property for the benefit of the wife and children from the dominion of the husband, and yet confer upon her alone or conjointly with others, as the case might be, a power to be exercised by way of gift or otherwise.

2 Wash. R. P., 603, 3d Ed.

She might even retain the instrument of appointment

until her death, and if made fairly and in accordance with the terms of the power, it would be good. Such a power was not a power *in the nature of a trust* as to children, and a court of equity could neither compel an exercise of the power nor supply the want of it. The power was a means of defeating the settlement.

1 Story Eq. Jur., Sec. 169.

Brown v. *Higgs*, 8 Vesey, 561.

Children, or other beneficiaries of the trust, were entitled to insist upon a due observance of the forms required in the execution of the power, but the power being well executed, had no further interest.

The first Married Woman's Act of Illinois was passed February 21, and went into effect April 24, 1861, but gave her control only of property not derived from her husband. Mrs. Forsyth came, therefore, within the policy of that law. The language of the deed was sufficient to give her a separate estate in equity.

Perry on Trusts, *supra*.

By the deed of 1861 Mrs. Forsyth, *as well as having the rents and profits for life*, became a joint donee of the power. How or by what means could Robert Forsyth divest her of that power any more than of her life interest? And what he could not do no person claiming through him might do.

To change the course of the title as defined by the deed required the consent of both. The giving of that consent rested in their discretion. They were not, nor could they have been, compelled to execute the power. They were to determine whether or not it was better for the children to let the settlement take its course,

or to defeat it. They were not trustees for the children with power to appoint to certain of them. The power was coupled with no trust, and they were not forbidden, as to the children, to be interested in the results of its exercise.

In *Dominic* v. *Michael*, *supra*, which was the case of a power to sell given to executors, now regulated by statute in Illinois, the court says that it may be regarded as established beyond the reach of doubt or controversy, "that an express power to dispose of lands, no matter for "what purpose, or by what instrument it is created, is "limited to the persons or person to whom it is given, "and can never be exercised by the representatives, real "or personal, unless they are expressly or impliedly des- "ignated as donees of the power."

If bankruptcy had not intervened, the lien of the judgment would have attached when Corwith conveyed to Forsyth in 1870, but subject to the trust deed to Scoville, as hereinafter stated *in consequence*, not in derogation of the power. Forsyth having, by his discharge become a new man or third person as to the judgment, could take a conveyance of the land after bankruptcy, regardless of the judgment.

The power was not an interest or estate, nor subject to a lien. It was personal not to one but to two.

As decided in *Jones* v. *Clifton*, if the property should be conveyed to Forsyth it would be liable for his debts, and should he exercise the power for the benefit of others without consideration the property would still be liable for his debts.

The meaning of course is debts presently existing, or

claims which a creditor has the right to enforce, not debts which have been discharged.

The judgment could not operate upon the power, except by force of the statute. It would not have been a lien at common law, and no execution was levied until long after the bankruptcy, and after the appointment.

Sugden says (2 Sugden on Powers, Sec. 33):

"Upon the same principle upon which dower was held "to be excluded by an appointment, it was decided that a "judgment against the party having a power of appoint- "ment, with the estate vested in him until, and in default "of appointment, was defeated by the subsequent execu- "tion of the power in favor of the mortgagee. (q.) The "court, in delivering judgment, said that it had been estab- "lished ever since the time of Lord Coke, that when a "power is executed, the person taking under it takes "under him who created the power, and not under him "who executes it. The only exceptions are, where the "person executing the power has granted a lease or any "other interest, which he may do by virtue of his estate, "for then he is not allowed to defeat his own act. But "suffering a judgment is not within the exception, as an "act done by the party, for it is considered as a proceed- "ing *in invitum*, and therefore falls within the rule. And "it is immaterial that the purchaser had notice of the "judgment (r), and that a portion of the purchase money "was set aside as an indemnity against it. (s.)"

Citing:

(q.) *Doe* v. *Jones*, 10 Barn. & Cress., 459.
Tunstall v. *Trappes*, 3 Sim., 300.

(r.) *Eaton* v. *Sanxter*, 6 Sim., 517.

(s.) *Skeeles* v. *Shearly*, 8 Sim., 153.
3 Myl. & Cra., 112.

In *White* v. *McPheeters*, 75 Mo., 286, there was a deed to a trustee for the use of the wife during life, and remainder *in fee* to the husband, in case he should survive. There was no attempt to limit the husband's estate. The deed authorized the trustee to *sell* upon the request of husband and wife, and to pay the proceeds to the wife or hold them *upon like trust.* There was no power to defeat the husband's estate, nor for the wife to appropriate the proceeds of sale to her own use. The husband and wife by deed released to A, who then released to the wife. A had also received a release from the trustee, made at the request of the wife and husband. There was no sale. The contest was between creditors of the husband, who became such after the execution of the deed of trust, and the devisees of the wife. The court held the trust not defeated, and the lands subject to sale for the husband's debts. The case is not parallel with that under discussion.

It would seem to be very clear, therefore, that the appointment to Corwith carried the title free of the trust and free also of the judgment of Brandies & Crawford. It was as if Loomis had conveyed to Corwith, and the trust deed had never existed.

Where a power is executed the person taking under it takes not from the person exercising the power, but from the person who created it.

"Every instrument of execution operates as a direction "of the use, and the appointee takes in the same manner "as if the use had been limited to him in the original set-"tlement creating the power."

4 Kent Com., 12th Ed., 327.

There was no appointment by way of mortgage. The *trust estate* owed Corwith nothing, and it is not pretended that Corwith was to reconvey *to Arthur*, or for the benefit of the trust. Whatever agreement, if any, there was in that behalf was between Corwith and Forsyth only; and, as has been said, Forsyth, not being a trustee for the children by reason of the power, was not precluded from having an interest in the result of its execution.

If there had been no bankruptcy and Forsyth had been the appointee, the land would have become subject to the judgment. An appointment to him therefore would not have prejudiced the creditor. *The latter now is affected by the bankruptcy just as he would be in the ordinary case of property acquired by the judgment debtor after a discharge.*

There was no violation of the rule forbidding limitations. The lives in being were Mary Forsyth and her husband. The remainder was to go to his children, if there should be any. If there should be none, to the children of Mrs. Warrack and Leonard Forsyth.

There was no attempt to limit a remainder over after the death of Robert Forsyth's children. His chidren should take the fee, and in case of their death, their heirs should inherit. In the contingency that there were no children born to him, the children of his sister and brother should take, but not otherwise.

So too "issue" in the deed clearly refers to children, so that there was no indefiniteness. There were children of Mrs. Warrack and Leonard Forsyth ready to take, but simply expectant upon the death, without a child, of Robert Forsyth.

II.

THE ARRANGEMENT BETWEEN FORSYTH AND CORWITH.

The bill alleges that the *conveyance* to Corwith was made with the understanding that it should be a security.

It will be noticed that nowhere in the pleadings or testimony is there a suggestion that there was a reservation express or implied by or through which the trust of 1861 might be kept alive or revived. Corwith took the title, it is admitted, but subject, it is said, to an equity in favor of Forsyth.

The principle upon which a deed, absolute upon its face, may be held to be a mortgage, is that such was the intention of the parties. The nature of the transaction, where a debtor conveys land to a creditor, it is said, raises the presumption that the deed was intended to be a mortgage. Proof of the existence and continuance of the debt, with the absence of a consideration for the deed, will be sufficient to sustain the application of the mortgagor to redeem.

This familiar doctrine is announced in *Peugh* v. *Davis*, 96 U. S., 332.

In the present case *no one* is seeking to redeem — Forsyth is not; the appellants by their bill make no offer to redeem.

But the intent of the transaction does not rest in presumption. It appears plainly, from the testimony of Forsyth. His security debt to Corwith was discharged

by the bankruptcy. It rested with him to revive it or not.

The remaining debt was contracted after bankruptcy, but at what time does not appear. Corwith agreed verbally with Forsyth that the latter might have the property. Forsyth was thus entitled to the privilege of purchase; even this was in parol, and not enforceable, because *Forsyth did not make the conveyance.* It was not an instance falling within the exceptions referred to in *Peugh* v. *Davis*, allowing proof of a trust by parol.

Forsyth says if he became able he was to be allowed to purchase. This is the spirit of his testimony. It is evident that Corwith was at liberty to sell and dispose of the property, and that Forsyth had no valid claim upon it nor upon the proceeds. It is not shown that after the deed to Corwith was executed he was entitled to collect from Forsyth the alleged, or any, specific indebtedness. Forsyth, whatever his language, evidently considered that the indebtedness was gone, and that all which he might get would come from his efforts to raise money during the time in which Corwith's good will should continue and he remain tractable.

When Forsyth and Corwith made their arrangement, Forsyth was indebted to Corwith, as has been stated, and the deed from Corwith to Forsyth was placed in Forsyth's hands to enable him "to raise money for the purpose "of paying for *the property*, for the purpose of getting "able to purchase it back," and "some weeks" prior to that, Forsyth had negotiated the loan in question, and the appellee's agents had agreed that he should have it "provided that he could get the deed;" and that on delivery together of the deed of Corwith to Forsyth, and

of Forsyth's trust deed to Scoville for appellee, the $15,000 was paid. Forsyth, therefore, purposed "to raise "money for the purpose of paying *for the property back* to "him"—not for the purpose of paying *the debt*, which necessarily was understood to be paid by the conveyance to Corwith. "The understanding or agreement in regard "to this deed (to Corwith) being held *as security* was, "that if he got able he was to *purchase it back from* "*him*" (Corwith); and therefore was it that "there was "no agreement that the property should be reconveyed "to "him (Forsyth) on the payment of this money," and that "there was no arrangement made for a reconveyance." Corwith agreed "to take the deed and to hold it, if For- "syth did not pay it." Forsyth was "to *purchase back* if he "got able to *redeem* it." *No interest* on the amount to be paid by Forsyth for the property when purchasing it back was spoken of or agreed upon. The method understood by which Forsyth proposed to raise the money with which "to purchase back the property," was that he should procure a loan upon the property *whenever* the title should be in him through Corwith's conveyance to him. Having effected such an arrangement with Wright & Tyrrell, appellee's agents, accordingly, on the delivery of the deed to Forsyth, and Forsyth's trust deed to appellants, the loan was made by which Forsyth "raised the money for the purpose of paying "Corwith for the property," and so "purchased it back." That this is the sense which Forsyth, in his testimony, both in chief and cross-examination, attached to and in which he used the words "redeem," "trust deed," "redemption" and "security," appears plainly at page 71, where, on his direct examination, he says: "If I "got able to *redeem it* I was *to purchase it back from*

him." For it is to be observed that on his cross-examination he does not once use the words "trust "deed, "redeem," "redemption," or "security," except as they are employed in leading questions, the answers to which are evidently given with the understanding by Forsyth that the words mean "the right to purchase back," as evidenced by Question 33, page 71, and answer, viz: "What "was the understanding or agreement then in regard to this "deed being held as *security?* Ans. If I got able to *redeem* "*it* I was *to purchase it back* from him." That he understood the words "secure" and "redeem" the same as "purchase back," and as expressive of the right it was agreed that he should have to "purchase back," there is additional evidence in Question 49, page 72: "You may state "whether you paid to Mr. Corwith out of that money all "that was *due* him secured by the property? Ans. No, "sir. I believe I left the balance in his hands." And in Cross-Question 63, page 76: "What was the arrange-"ment with regard to redemption to which you have "testified in your chief examination? Ans. That I was "to *redeem it* as soon as *I was able.*" And in Question 33, page 71, and answer: "What was the understanding "or agreement then, in regard to this deed being held as "*security?* Ans. If I got able to *redeem* it I was to "*purchase it back from him.*" He was to *redeem it* by *purchasing it back;* and Corwith was secured by having his debt paid by the property.

"It is sometimes difficult to draw the line of distinction "between a transaction which constitutes a mortgage and "one where there is a mere right to repurchase on the "part of the grantor upon certain terms." (2 Wash. Real Property, 4th Ed., p. 56, Sub. 14.) "It is equally "competent for the parties to give the transaction of a

"conveyance of land either of these characters according "to their intention; and the proposition may be regarded "as a general one that a conveyance is not a mortgage, "unless the grantee intended to make a loan upon it as "security." (*Ibidem*, 57, Sub. 15, and cases cited.)

In the case of *Rue* v. *Dole*, 107 Ills., 275 (advance sheets), which was a bill to reedem, the Supreme Court of Illinois use the following language:

"There is no substantial dispute between the parties in "regard to the facts, except in regard to the value of the "premises. It appears from the evidence that in 1869 "McQuestion, the testator of complainants, made a loan "of $30,000 to the defendant, Rue, and in 1872 he made "an additional loan of $15,000, both of which were se- "cured by deeds of trust on the premises. McQuestion "died in 1875. No interest was paid on the loans after "1874. In the fall of 1877, interest and taxes having "accumulated on the property to quite a large sum, the "executors wrote the defendant that unless the interest "on the trust deeds was paid they would be compelled to "foreclose. The defendant replied that he preferred to "make a deed rather than have a sale under the trust "deeds, or a suit in court. After some correspondence "and negotiation, it was finally agreed that Rue and his "wife should deed the premises to the executors, who "would cancel the claims against Rue and give him a "contract, under which he could repurchase on or before "March 1, 1879. Under this arrangement the warranty "deed of March 19, 1878, and the contract of same date, "were executed. Before the execution of the deed and "contract, the amount due the executors on the two loans "was computed, and found to be, at the date of deed,

"$64,340, to which was added interest at the rate of "seven and three-tenths per cent., making $69,046, which "is the consideration named in the deed and amount "named in the contract. Upon the execution of the deed "and contract, the notes and deeds of trust were can- "celed and surrendered to the defendant, and the posses- "session of the property was delivered to the executors. "About the 25th day of January, 1879, Morey, at the "request of the defendant, wrote the executors, asking an "extension of time for three months for the payment of "the amount named in the contract. On the 3d of Feb- "ruary the executors replied, refusing an extension, of "which the defendant was at once notified. After the "executors had refused to extend the date of payment, "on February 19 the contract was placed upon record.

"These are in substance the facts, so far as it is neces- "sary to state them in order to arrive at a proper under- "standing of the questions involved, and, under the facts, "the question arises whether the deed upon which com- "plainants rely is absolute, or whether the transaction of "March 19, 1878, which resulted in the deed and con- "tract, is to be regarded as a mortgage.

"The deed purports upon its face to convey the prem- "ises absolutely, and the contract is a mere re-sale of the "premises upon the payment of a certain sum at a speci- "fied time. So far, then, as appears from the terms of "the deed and contract, there is nothing to indicate that "the transaction was a mortgage. It is true that the "deed was made in satisfaction of a debt which was se- "cured by mortgage on the same premises, but a mort- "gagee has a right, if he thinks proper, and can agree "with the mortgagor on the terms of purchase, to pur- "chase the mortgaged premises. The mere fact, there-

"fore, that this deed was made in satisfaction of a prior "mortgage, does not make such deed a mortgage. Nor "was there anything in regard to the surrounding cir- "cumstances to indicate that the deed was taken as a "mortgage. Here was a large debt, long past due, with "unpaid accumulated interest amounting to some $20,000. "No taxes had been paid by the mortgagor for four or "five years. Under such circumstances it is but reason- "able to suppose that the mortgagee would insist that "the relation of mortgagor and mortgagee should termi- "nate, and that the debt should be paid or the land sold "in satisfaction of the debt. This is what the executors "did; and rather than have the land sold on the deeds of "trust, or under decree of foreclosure, the mortgagor "agreed to convey the land absolutely to the mortgagees, "and take back a contract, as he no doubt thought there "was a margin in the property, for a reconveyance, "upon condition that he paid a specified amount within a "day named.

"There is nothing in the circumstances that surround "the arrangement that tends to show that the parties in- "tended that the relation of mortgagor and mortgagee "should still continue. * * *"

Forsyth applied to appellee's agents for a loan of the money with which to purchase back the property "some weeks" before. Corwith then handed him the deed of the property to enable him "to raise money for the pur- "pose of paying him (Corwith) for the property," appellee, by his agents, having agreed "if I (Forsyth) could get the "deed and give the security, to advance the money." This deed and Forsyth's trust deed, together with the deed of Arthur to Corwith, were subsequently delivered

to appellee's agents, and the advance of $15,000 made simultaneously, 15th March, 1870.

The property consisted of three lots, numbered 4, 5, 6, etc., on which was a dwelling house, barn and out-buildings. The house was on lots 5 and 6. The premises were considered by Wright & Tyrrell to be worth, for loaning purposes, in the spring of 1870, improvements included, $30,000. "The buildings constituted twenty-"five per cent. of this estimate. The barn and outbuild-"ings stood on the land of the Illinois Central railroad "over ten feet, which rendered them valueless. When "the house was originally built, it was fit for the locality; "but lately, in consequence of a very superb class of "buildings going up, it is totally inappropriate, and would "add little or nothing to the value of the real estate."

"It was a fancy property; it was a fictitious value." In 1860 or 1861 Forsyth bought it at $55 per front foot ($4,125).

There is no evidence of the market value or of the opinion of Corwith as to value.

It seems, therefore, that from a property estimated by Wright & Tyrrell at $30,000 in the spring of 1870, one-quarter, or $7,500, is to be deducted because of the valuelessness of the house and outbuildings, leaving the estimate at $22,500. Now, if the fact that it was "a fancy property" — "a fictitious value" — is considered, there could be no unreasonableness attributed to a purchaser, if he should decline to purchase at a "fancy" or a "fictitious" price, a piece of property that ten years before had been valued at only $4,125, and bought for that sum. Therefore it cannot, under such circumstances, be concluded

that the price of the property was unreasonable. Certainly it was not grossly inadequate.

Applying to the facts the principle which has been uniformly held, that a conveyance in satisfaction of a *prior debt*, is not a mortgage, *but a sale*, with a right to repurchase, it will be seen that the appointment to Corwith was not a mortgage. It lacked these essential elements:

1. There was no debt. The grantor owed nothing either in a representative or individual capacity.

2. Corwith having already, by the appointment, the equitable title, was not under obligation to impose terms upon himself, or a trust upon the land. Whatever he did, therefore, was purely voluntary.

3. The agreement between Forsyth and Corwith was extraneous to the trust, and was in parol. Whether or not Forsyth could enforce it, it was at best a personal right which did not pass to a judgment creditor. It was not an equity of redemption nor other interest in land.

But if this view be incorrect, it must be granted that the intention was that Corwith should have the right to sell, and necessarily to fix the terms of sale. Certainly no more was required than the assent of Forsyth to such method of proceeding as he should adopt or approve for the purpose of realization.

The conduct of all concerned, to say nothing of the testimony of Forsyth, so shows. Walker, Dexter & Smith, the attorneys who gave the opinion, understood that the conveyance to be made by Forsyth, the deed to Corwith, and from him, having been submitted to them, would carry the fee to Scoville in trust for Cochrane.

Wright & Tyrrell knew that the deeds were to be placed of record, and that Corwith would be entitled to the money. They did not doubt Corwith's right to sell.

Again, the conveyance from Corwith to Forsyth was delivered and recorded simultaneously with the trust deed from Forsyth to Scoville, when also the money was simultaneously paid by appellee's agents to Forsyth, and by Forsyth to Corwith, on March 15, 1870. All these constituted one *indivisible act*. The deeds took effect only *then* and that *instantaneously*. There was no interval of time of which a paramount judgment lien could be predicated. The title passed instantaneously by the conveyance from Corwith to Forsyth and from Forsyth to the appellee. The instant that Forsyth took from Corwith the fee passed instantaneously into appellee by Forsyth's trust deed to Scoville. In the same instant the $15,000 was paid by appellant's agents.

1 Jones on Mortgages, § 466.

At this time (1870) neither Walker, Dexter and Smith nor Wright and Tyrrell knew of the Brandies and Crawford judgment; it does not appear that it was shown upon the abstract, and it was probably omitted by the abstract makers because Forsyth had been discharged, and it was upon its face no lien.

Wright and Tyrrell knew only that Corwith would make a deed on receipt of a considerable portion, or as they understood, the greater part of the moneys to be advanced. *The record showed the title in Corwith.* Cochrane had no actual notice.

Brandies and Crawford's judgment was *at the most* a lien upon an equity or equitable interest, and their claim

in pursuance thereof should not *in any view* prevail against one having *not only the legal title, but a superior equity.*

98 Ill., 458, *supra.*

If, however, Forsyth became the owner of an interest in the land in January or March, 1870, through the execution of the power, the title being then in Corwith, was it not the duty of appellant, who had knowledge of the bankruptcy, and who had endeavored to set aside the discharge, and had failed, to apprise Corwith or those who might become purchasers under him of their claim?

The appellee was a *bona fide* purchaser for a valuable consideration. He, therefore, has a preferable equity to creditors.

This levy on Forsyth's supposed interest was made on May 9, 1870. If Cochrane or his agents had been apprised of their claim the money would not have been paid over on March 15. The levy was quietly, if not clandestinely made; the appellants followed that line of action equally as quietly until the judgment sale ripened into a deed on September 9, 1871. Then their scheme blossomed out in the act of forcible entry and possession, and the assertion of a superior and paramount title to the land.

They did not wish to divulge or disclose what they should do, lest either their claim might be contested, or they be forced to an action at law.

If it be assumed that they acquired by the judgment a lien upon an equity which Forsyth had in March, 1866, the appointment in 1869 created a paramount title.

Why did they not then file a bill in aid of their judgment to declare the execution of the power inoperative?

This would have been not only proper and advisable in practice, but was demanded in fairness and justice to others.

III.

THE SALES UNDER THE TRUST DEEDS.

These were regular and in conformity with the powers conferred. No proof of irregularity was made, nor is anything alleged against them.

This suit was not *lis pendens* as to Cochrane until 1876, when he appeared and asserted his title. The second trust deed was made before the filing of the bill and in April, 1872, at which time the rights of Cochrane under the second or so-called "new" transaction accrued.

IV.

THE FORCIBLE ENTRY AND DETAINER SUIT.

This suit was determined against Brandies & Crawford, and was an adjudication as to the right of possession. They have shown no other than the wrongful possession of which they were thus ousted. Cochrane sought by his cross-bill to quiet his title, and it is respectfully submitted that the decree thereon was right.

GEORGE W. SMITH,
EDWIN F. BAYLEY,
Counsel for Appellee Cochrane.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1883.

No. 1002.

ADOLPHUS BRANDEIS, WILLIAM M. CRAWFORD, CHARLES H. CRAWFORD, ARTHUR S. CRAWFORD, DAVID CRAWFORD AND ROSANNA CRAWFORD,

Appellants,

vs.

JOHN COCHRANE, JAMES D. WALLACE, ROBERT FORSYTHE AND JOHN FORSYTHE,

Appellees.

Appeal from the Circuit Court of the United States, Northern District of Illinois.

BRIEF IN REPLY.

JOHN S. MCNU.

For Appellants.

CHICAGO
MORRIS O'BRIEN, LAW, BRIEF AND ABSTRACT PRINTER, 1883 WASHINGTON ST.
1883

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1884.

(No. 92.)

ADOLPHUS BRANDIES, WILLIAM M. CRAWFORD, CHARLES H. CRAWFORD, ARTHUR S. CRAWFORD, IDA E. CRAWFORD AND ROSANNA CRAWFORD,
Appellants,

vs.

JOHN COCHRANE, JAMES D. WALLACE, ROBERT FORSYTHE AND JOHN FORSYTHE,
Appellees.

Appeal from the Circuit Court of the United States, Northern District of Illinois.

BRIEF IN REPLY.

I.

THE JURISDICTION.

The interests of Wallace and John Forsythe, and also that of Robert Forsythe, if any he had which did not pass to the complainants under the marshal's sale and deed, are all vested in Cochrane. His admissions, therefore, are all that need be shown in support of any fact essential to the maintenance of the suit.

In his answer (*p. 24*) Cochrane admits the possession of appellants. His averment that such possession was

obtained by breaking into the house is immaterial, if true. The house had been vacant and unoccupied for months prior to the entry. (*Forsythe's testimony, p. 70.*) If, by their purchase at the marshal's sale, and deed, they acquired the legal title to the premises, appellants had a right to presume that Forsythe would recognize the legality of the transaction, and would not withhold possession. There being, to all appearances, a practical abandonment of the possession by him, an entry by picking a lock or raising a window was not, under the circumstances, unlawful. If, on the other hand, the title acquired under the sale and deed was merely equitable, as is asserted by counsel opposed, that of itself will afford ground for equitable relief.

Appellants, having been in possession at the time of the commencement of the suit, and for eight months previous thereto, had the right to file a bill to quiet their title The jurisdiction of the court having once attached, could not be defeated by the forcible entry and detainer suit before Justice DeWolf; especially not where it appears they were not parties, and are not shown to have had notice of the proceeding.

It is further submitted that many questions presented by the record are of peculiarly equitable cognizance. Among these are, as to the extent of Forsythe's interest in the trust created by the deed to Arthur, which was subject to the lien of the judgment. Whether the appointment to Corwith was by way of mortgage, and, if so, the amount of the indebtedness secured thereby. Whether Corwith was entitled to priority over the judgment, and, if so, whether Cochrane is entitled to stand in his place to

the extent that the money loaned by him to Forsythe went to pay Corwith.

II.

CONCEDING MARY TO HAVE TAKEN THE FIRST LIFE ESTATE, A VESTED REMAINDER FOR LIFE WAS GIVEN TO ROBERT.

An unpossessed remainder is vested, if by enduring longer than the preceding estate, it would certainly take effect in possession; but any additional contingency destroys its vested character.

Mandersen v. *Lukes*, 23 Penna. St. 131.

In *Wood* v. *Lyons*, 25 Wend. 119–144, a definition of a vested remainder was given by the chancellor, which was approved by the Supreme Judicial Court of Massachusetts in *Blanchard* v. *Blanchard*, 1 Allen, 227, and by this court in *Doe* v. *Considine*, 6 Wall. 458. It is as follows:

"Where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to be determined by an event which must unavoidably happen by the efflux of time, the remainder is vested in interest as soon as the remainder-man is *in esse* and ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from taking effect in possession.

"Yet, if the estate is limited over to another, in the event of the death of the first remainder-man before the determination of the preceding estate, his vested estate will be subject to be divested by that event."

Wescott v. *Wescott*, 125 Mass. 268, affords an instance of a vested remainder subject to be divested in the manner suggested by the last clause of this definition. There the devise was in trust for the widow of the testator for life; after her decease the estate to be transferred to the son and daughter, in equal shares, if both survived the widow, and if either of them should die in the lifetime of

the widow, then to the survivor; held, to give a vested equitable remainder to the son and daughter. Numerous other instances are cited from the books in *Blanchard* v. *Blanchard*, 1 Allen, 228 and 230.

The estate of Forsythe falls strictly within this accepted definition of a vested remainder. It was to take effect in possession immediately upon the determination of the preceding estate. In other words, he had all along the immediate right to the possession, if the possession should become vacant. The particular estate was to determine upon an event which must unavoidably happen by the efflux of time, and nothing but his own death before the determination of the particular estate, could prevent his remainder from taking effect in possession.

It is also clearly excluded from each one of the four classes of contingent remainder, to the one or the other of which Mr. Fearne says every instance of a contingent remainder may be reduced.

His remainder does not depend on a contingent determination of the preceding estate, as in the first class. The event on which it is to take effect in enjoyment is not independent of the determination of the preceding estate, as in the second. Nor could the particular estate determine before the happening of that event as in the third, the remainder in this case being limited to vest in enjoyment, the very instant the particular estate ceased. The remainder-man was in being and ascertained, which excludes it from the fourth class.

The capacity to take, if the possession should become vacant, which distinguishes a vested from a contingent remainder, arises when there is a person in being and

ascertained, who meets the description of the remainder-man, and nothing is interposed between him and the possession, except the particular estate.

Appellee overlooks the distinction between the event in which the remainder vests in interest, and that on which it is to vest in enjoyement. Every vested remainder for life is contingent, as to enjoyment, so long as the preceding estate continues. By the death of the remainder man before the termination of the preceding estate, the vested remainder is destroyed. The only questions are: Is the remainder man in being and ascertained? Is he capable of taking, if the possession should become vacant? These facts appearing, the remainder is vested in interest, no matter how uncertain it may be of vesting in enjoyment.

III.

THE APPOINTMENT TO CORWITH WAS BY WAY OF MORTGAGE.

This also is admitted by Cochrane. In his answer, page 23 Record, folio 45, he says:

"This defendant further admits, on information and belief, that said conveyance was made by said Arthur to Nathan Corwith, as security to him for indebtedness of said Robert Forsythe to said Corwith. Further answering, this defendant admits the conveyance by Corwith to said Robert Forsythe, as alleged in said bill, and he admits, on information and belief, that the only consideration therefor was the payment of said Forsythe's indebtedness to said Corwith."

And in his cross-bill, page 40, folio 88, are the following averments:

" And your orator charges, on information and belief, that the real consideration for such conveyance from said Arthur to said Corwith, was the loaning and advancing by said Corwith to said Robert Forsythe, of a large sum of money, the amount of which is unknown to your orator; but he believes it to have been about $12,000; that such indebtedness remained unpaid until in April, 1870, when your orator made the loan of

$15,000 to said Robert Forsythe, and the money so borrowed was nearly all paid over directly to said Corwith by your orator, to obtain from him the title to said lots, and put the same in proper condition as security to your orator for such loan."

No evidence was needed in support of a fact thus plainly admitted. Nor were appellants required to rebut testimony to the contrary, if any such there is in the record, which they deny.

Forsythe, the only witness testifying on the point, says the conveyance was to secure Corwith money he owed him. (*Record, p. 71; Int. 39.*) That he was to redeem it as soon as he was able, by paying all he owed Corwith. (*P. 76; Int. 63 and 64.*) He had the right of redemption whenever he was able to pay, and the title was to be held by Corwith for the balance due him. (*P. 77, Cross. Int. 87 to 89.*)

Had the transaction been a sale with the right to repurchase, some definite time would have been fixed upon, within which the repurchase was to be made, or the title in Corwith to become absolute. Then there is the fact that Forsythe remained in possession after the conveyance, leasing and controlling the property after ceasing to occupy it personally.

Another circumstance tending in the same direction, is the gross inadequacy of the price.

The premises at the time were worth $30,000 *at least.* (*P. 91, folio 212.*) The depreciation to which Mr. Cochrane in his brief refers, and which he claims reduced this valuation to $22,500, was suffered between the date of this transaction and 1876. (*Pp. 90 and 91, folios 21 to 213.*)

Though the house, in consequence of the superior class of buildings going up, had become totally inappropriate for the locality, the property appears to have yielded a rental of $1,800 a year, from 1872 to 1875. *(P. 89, folio 209.)*

Mr. Cochrane is equally wide of the mark in regard to the amount of the indebtedness secured. In his brief, he claims that the $7,000 paid Corwith, was not all that was due. In support of this claim, he refers to Forsythe's testimony *(p. 72, Int. 49)*, which is as follows:

Int. 49.—You may state whether you paid to Mr. Corwith out of that money, all that was due to him, secured by the property?

A.—No, sir; I believe I left the balance in his hands.

If Forsythe had any definite idea he meant to convey by these words, it is difficult to imagine what it was.

In answer to cross-interrogatory 60, page 76, Forsythe says he owed Corwith a personal debt of about $7,000 or $8,000, and was security for about as much more—about $16,000 or $17,000.

There is no evidence that the principal failed to meet this surety debt. From the fact that no part of it was paid by Forsythe when he obtained the conveyance from Corwith, the clear inference is, that there was no default on the part of the principal. If, then, the surety debt formed part of the consideration, that of itself would be conclusive that the conveyance to Corwith was intended as a mortgage. If it did not, then the only consideration was an indebtedness of about $7,000. This, for property worth at least $30,000 and of the rental value of $1,800

a year, would be so grossly inadequate as to afford a strong presumption that the transaction was intended as a mortgage. With the other circumstances mentioned, and the admissions contained in the answer and cross-bill, there can be no room for doubt upon the subject.

Respectfully submitted,

JOHN S. MONK,

For Appellants.

IN THE

Supreme Court of the United States.

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vs.

ADOLPHUS BRAGKINS, WILLIAM W. CRAWFORD ET AL.,
Appellants.

vs.

JOHN COCHRANE, JAMES F. WALLACE, ROBERT FORSYTHE AND JOHN FORSYTHE,
Appellees.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF OF JOHN COCHRANE, APPELLEE.

Index of Evidence and Synopsis of Case.

CHICAGO
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1883.

IN THE

Supreme Court of the United States.

No. 1043.

ADOLPHUS BRANDIES, WILLIAM W. CRAWFORD et alias,
Appellants,
vs.
JOHN COCHRANE, JAMES D. WALLACE, ROBERT FORSYTHE and JOHN FORSYTHE,
Appellees.

Appeal from the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF OF JOHN COCHRANE, APPELLEE.

Index of Evidence and Synopsis of Case.

CHICAGO.
SEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET.
1883.

STATEMENT.

The appellants claim to have recovered a judgment in March, 1866, against Robert Forsythe and George T. Brown and to have sold, and under the sale to have received a marshal's deed of the lands in question conveyed to Forsythe by Corwith, to whom they have been conveyed by the execution of a power contained in a trust deed to William R. Arthur (pages 2, 3, 4; folios 4 to 9), and that their judgment became a lien on the lands in question for either or both of the reasons, viz: First, that though purchased with the means of Robert Forsythe, they had been conveyed in 1861 at the request of Robert Forsythe by the vendor to William R. Arthur in trust, etc., in fraud of his—Forsythe's—creditors (pages 2, 3; folios 4, 5, 6; answer to bill and cross-bill, page 47, folios 106, 108); and, secondly, that they had been conveyed under a power raised in the trust deed to Arthur, by Arthur to Corwith, and by Corwith to Forsythe. (Pages 3, 4, 5; folios 6 to 11, inclusive.) The first of these reasons is adequately disposed of by the testimony of Forsythe (page 70; folio 15 to 28, inclusive), and the case of *Haines et al.* v. *Harris*, 54 Ill., 74. The answer to the second is that, claiming as they do, the interest and estate of Robert Forsythe derived from Corwith by the marshal's deed to them, they are estopped to impeach or deny either the power raised in the deed to Arthur from Loomis or the due execution of the power as the same are fully set forth and recited in the deed of Arthur to Corwith. (See authorities under point VI.) The appellants also claim

that their judgment was a lien upon an interest of Robert Forsythe in the lands in question under the contingent remainder limited to him in the trust deed to Arthur. The authorities, under point I and the opinion of the court (page 102, folio 239), hold that he had no interest liable to such a lien. The appellants claim that after the death of Mary E. Forsythe, without issue, whether in November, 1869, or about January 1, 1870, their judgment lien attached to a life estate in Robert Forsythe. The evidence is that on the 3rd of November, 1869, Forsythe and wife made their written request in the lifetime of Mary E. Forsythe, and the authorities hold (see point IV) that *when* the request was made and power executed he had no life estate. See opinion of the court (page 103, folio 240) that Forsythe and wife's appointment executed the power. In case, however, it is held that the power was not executed by the request of Robert and Mary E. Forsythe November 3, 1869, and only by the deed of appointment from Arthur January 4, 1870, (see point IV, subs 1, 2, 3), the authorities hold that the life estate that Robert Forsythe took, if any, at the death of his wife was divested and cut off by Arthur's execution of the power.

The appellee claims the fee in the lands derived from Forsythe through the execution of the power in trust raised in the trust deed to Arthur, and the appointment to Corwith and Corwith's conveyance to Forsythe. The execution of the power in trust operating to the defeat of all the estates limited in the deed of trust to Arthur, including whatever interest Forsythe may have had in the lands thereunder, the appellants seek to invalidate it with the objections: (1.) That Forsythe (one of the two persons at whose joint written request Arthur was to appoint a fee in the lands to whomsoever designated, and at whose written request, jointly with his wife, Mary E., the second person, he did appoint to Corwith the person designated), having become a bankrupt in 1868, was incapable of

joining in said written request, his power of request having passed to his assignee in bankruptcy. The authorities, however, hold (see point X) and the opinion of the court (page 102, folio 239) holds that Forsythe, whether as donee of the power, or consenting party, had not at the time of his bankruptcy such an estate in the lands as would pass to his assignee in bankruptcy. (2.) The appellants object against the valid execution of the power that the agreement between Forsythe and the appointee Corwith converted the deed of a fee from Arthur to Corwith, absolute on its face, into a mortgage. The evidence and the authorities hold (see point III) that the agreement was not a mortgage, but a contract "to purchase the property back," and the opinion of the court holds (page 103, folio 240) "that the execution of "the power under the appointment by Forsythe and his wife "was good, and that the only estate Forsythe has had in "the lands has been by virtue thereof." (3.) The appellants object that Forsythe having made the written request, they, as judgment creditors, could seize the lands as part of his assets. The evidence that appellee was a *bona fide purchaser for a valuable consideration*, and the authorities (see point V, sub. 2) applicable thereto, hold that the title of the appellee is preferred to that of the judgment creditors, the appellants, "as having a better equity." The opinion of the court holds (page 102, folio 240) that the appellant's judgment, execution sale and deed did not invest them with any interest in the lands. (4.) The appellants claim a fee in the lands from their judgment, execution sale and deed of conveyance to them from the marshal of the fee in Forsythe under the execution of the power. (Bill, p. 4, folio 8; answer to cross-bill, p. 49, folio 111.) The evidence and the authorities hold (see point VI) that they are estopped to impeach or deny the recitals in the deed of Arthur to Corwith, that the power was duly executed. The opinion of the court

holds (page 103, folio 240) that when Forsythe acquired title from Corwith appellants' judgment had been extinguished by Forsythe's discharge in bankruptcy.

The appellee claims that the appellants were not judgment creditors of R. Forsythe; that they had no judgment against him; that their judgment debt was effectually and finally canceled and extinguished by Forsythe's discharge in bankrupty in 1868. (See facts and authorities under Point II; see also opinion of the court, page 103, folio 240.) That Forsythe "became a bankrupt under the law of congress in 1868." "In "1868 Robert Forsythe took the benefit of the bankrupt law "and was discharged under the law." (Statement of facts by the court, page 101, folio 236.)

But if the appellant's judgment was *not* discharged by Forsythe's becoming a bankrupt, the appellee claims that the power being well executed in Corwith, and the appellants not being permitted to deny its valid execution, as recited in Arthur's deed to Corwith, the trust deed to Scoville, under which he derives title, gave him a *specific* lien on the lands, which is superior and preferable to the lien of a judgment, which is only *general*. (See Point I, subsidiary points and authorities thereunder.)

So, also, in the supposed life of appellants' judgment, notwithstanding Forsythe's bankruptcy at the same time, the power is held to have been well executed in Corwith, and the appellants being estopped, as aforesaid, to impeach or deny its execution, the appellee claims that the delivery and filing for record of the deeds from Arthur to Corwith, and from Corwith to Forsythe, and the deed of trust to Scoville for appellee having been simultaneous acts concurrent with the payment to Forsythe of the purchase money, his title under the trust deed takes precedence of prior judgment liens, and therefore defeats the title claimed by appellants under the marshal's deed. (See Point II, subsidiary points and authorities.)

The appellee, in addition to the foregoing claims, insists that the conveyance to Wallace by Carol Gaytes, the assignee in bankruptcy of Robert Forsythe (page 14, folio 28; page 18, folio 36; page 26, folio 60), of whatever interest had passed to him as such assignee in said lands, and the tax title in John Forsythe (page 80, folio 207; page 89, folio 209; page 93, folio 218—see abstract of tax title—page 94, folio 220), came to the appellee. (See judgment of the court, page 55, folio 127.)

Index of Evidence.

March 30, 1861, date of the original trust deed from Horatio G. Loomis and Wm. R. Arthur, and reform of the same in chancery, &c. (Record, p. 99, folios 231–232; p. 6, folio 13): "Upon the trust and to the uses, interests and purposes herein-"after expressed, limited and declared, to have and to hold "&c., unto said party of the second part, his heirs, &c., upon "trust and confidence nevertheless to permit Mary E. Forsythe, "wife of Robert Forsythe, of Chicago, to use, occupy and enjoy "and receive the rents and profits of said lands and premises, "for her life and to her own use, and at any and all times upon "the order or request in writing of said Mary E. Forsythe and "said Robert Forsythe, jointly to convey said lots, or either or "any of them, to such person or persons as they may designate." By the decree reforming this deed and the master's deed November 6, 1869, there was added here (Record, pp. 99, 100; p. 3, folio 5; p. 7, folio 15), "in fee simple absolute, in which "event the trusts hereinafter mentioned shall be cut off and "forever cease. And all right, title and interest of the several "*cestui que trusts* hereinafter mentioned shall thereupon and "thereby be revoked and forever cease." And in case said Mary E. shall die without issue in the lifetime of her said hus-

band, then to convey said lands to said Robert Forsythe for life immediately after the decease of said Mary E., to hold to him for his use for life, and to his child or children, if any lawfully begotten, in fee simple, and remainder to their use and to them equally as tenants in common, &c. * * * But if said Robert shall have a child or children born of his said wife, or of any future wife, then instead of the conveyance aforesaid to the children of said Leonard E. Forsythe, &c., the said trustee is to convey said lands to said Mary E. or to Robert (as the one may chance to survive the other) to her or his use for life, as aforesaid, and to the child or children who may be so born to them or to him, in fee simple, and remainder to their use and to them equally as joint tenants in common. (Record, p. 3, folio 5; p. 7, folio 15; p. 8, folio 17.)

The written request of Robert and Mary E. Forsythe jointly to William R. Arthur to convey the lands to Nathan Corwith, November 3, 1869, "as soon as the said court shall decree "that said—be reformed as prayed, then and in that event we "hereby request you," &c. (Record, p. 3, folio 5; p. 4, folio 7; p. 42, folio 92; p. 79, folio 184.) Recitals in deed from Arthur to Corwith (Record, pp. 99–100, folios 231, 231½, 232.)

The property was purchased with Robert Forsythe's means of Ezra L. Sherman in 1860 or 1861, Loomis being the trustee of the property, for fifty-five dollars per lineal front foot, and when he was free from debt, and was worth about $20,000. (Record, p. 70, questions 15, 16, 17, 18, 19, 20, 21.) He took possession and built a house and barn on it. (Page 70, questions 23, 24, 25.) Mary E., his wife, lived there from 1861 to 1869, the time of her death. (Record, p. 96, folio 225.) She died in November, 1869. (Record, p. 72, questions 52, 53.)

Conveyance by Wm. R. Arthur to Nathan Corwith, dated May 4, 1870. Consideration, eleven dollars, (Record, pp. 8, 42, 99,) containing recitals (pages 8–9, folios 17, 18), that the trust deed from Loomis to Arthur provided that upon the

written request of Robert and Mary E. Forsythe jointly, Arthur should convey, &c.; that the deed was reformed, and that in pursuance thereof said joint request made, &c. Arthur conveys to Nathan Corwith.

Mary E. Forsythe died without issue in November, 1869. (Record, p. 72; Questions 52, 53.) R. Forsythe after that married, and was a married man 19th July, 1873, and then had one son born in wedlock, more than a year old (Id., pp. 69, 72; Questions 54, 55, 56, 57, 58, 59), and who was alive July 19, 1873.

Arrangement between Nathan Corwith and Robert Forsythe relative to the conveyance from Wm. R. Arthur to Nathan Corwith, under the power contained in the Loomis trust deed of March 30, 1861. The conveyance was made at the request of Forsythe and his wife. (Record, p. 71; Question 31.) Forsythe made the arrangement with Corwith with reference to the conveyance from Arthur to Corwith. (Page 76; Cross-Questions 57–59.) If Forsythe "got able to redeem it, "he was *to purchase back from him*," that was "the under-"standing or agreement in regard to the deed" from Arthur to Corwith "being held as security" by Corwith. (Page 71, Question 33.) "It was uncertain for whom," whether for himself (Forsythe) or for whom, "he would purchase back." (Page 71, Question 34.) The method understood by Corwith and Forsythe by which Forsythe was to raise the means "for "paying Corwith for the property" and so "purchasing the "same back from him," was that Forsythe should take the deed (page 71, Question 37), to show to appellee's agents (Wright and Tyrrell) who "some weeks" before had agreed to furnish him with the means, provided he could get the deed, etc. (Page 71, Question 38.) The means were accordingly furnished to him by appellee's agents simultaneously with the delivering and recording of the deeds from Arthur to Corwith, of Corwith to Forsythe and of Forsythe's deed of trust to Sco-

ville, trustee of appellee, March 15, 1870. (Page 86, folio 201.) See also, the answer of Wallace (page 13, folio 25), and that of Forsythe (page 17, folio 34). That out of the money paid to Forsythe by appellee's agents on that occasion, he instantly paid to Corwith the consideration in which his (Corwith's) deed was given to him (Forsythe). "To purchase the prop-"erty back," Forsythe was to pay to Corwith the amount of the indebtedness, in discharge of which he had requested that the property should be conveyed to him, viz: the sum of about $17,000. (Page 76, Cross-Questions 60, 63, 64.) No interest was spoken of, stipulated for or reserved. (Record, ubique.) The words "redeem," "security," "trust deed," "redemption" are words thrust by the leading questions of shrewd counsel into the mouth of the witness Forsythe (page 77, Cross-Question 86; page 76, Cross-Questions 63, 64; page 77, Cross-Questions 88, 89, 90), he understanding the words in the sense of "*a right to purchase back*" as evidenced by question 33, page 71, and answer, viz: "What was the understanding or "agreement then, in regard to this deed being held as *se-*"*curity?*" Answer. "*If I got able to redeem it I was to pur-*"*chase back from him.*" Collate with this question (33, page 71), Question 49, page 72, and Cross-Question 63, page 76, and the answer to each of them, and it is clear that "secure and "redeem" meant to sell and purchase back. (See Forsythe's answer, page 16, folio 32, and Wallace's answer, page 22, folio 24, denying that a mortgage was intended, and averring that he purchased the property from Corwith.) The agreement between Forsythe and Corwith was a conditional sale and not a redeemable mortgage.

Conveyance of Nathan Corwith to Robert Forsythe, dated March 12, 1870; filed for record March 15, 1870; consideration $15,000. (Pages 9, 43, 80–98.) "The deed was given him, For-"sythe, for the purpose of raising money" with which "to pay "him (Corwith) for *this said property*," "to enable him (For-

"sythe) to raise money." (Page 71, Question 37.) Forsythe had been in negotiation "some weeks" before with appellee's agents, Wright and Tyrrell, and provided he could get the deed and give them the security, they would advance the money (page 71, Question 38) $15,000 (page 71, Question 39). The deed from Corwith to Forsythe was delivered when Forsythe got the money. (Page 72, Question 46.) The deed was delivered to Wright when the loan was agreed on and *before* the money was paid out. (Page 85.) The deed was recorded by Wright and Tyrrell March 15, 1870 (page 85), together with the deed from Arthur to Corwith, and the trust deed of Forsythe to Scoville, appellee's trustee (pages 85, 86), on the opinion of Walker, Dexter and Smith, which Wright "most implicitly relied on" (page 86, folio 202; page 99, folio 230); that the abstract of title and the deed from Arthur to Corwith, and the deed of Corwith to Forsythe showed a good title in Forsythe. The money was paid when the deeds were filed for record. (Wright's answer, page 86, folio 202; page 85, folio 200). That the opinion of counsel required them to have the deeds, and to put them on record before the title would be good in Forsythe, and that the money was not paid *before* the deeds were put in their hands, see Forsythe's answer, page 77, Cross-Question 77.

The simultaneous delivering and filing for record of the several deeds of Arthur to Corwith, of Corwith to Forsythe, and of the trust deed of Forsythe to Scoville, trustee, to secure the loan of $15,000 by appellee, and the payment of the $15,000 to Forsythe, on the deeds being recorded, appear at *the pages and folios of the record as given in the next preceding paragraph.* See also Forsythe's answer (page 131, folio 25; page 17, folio 34), that the delivery of the deeds and the payment of the money were simultaneous acts.

The search of the appellee furnished no evidence of the existence of the appellant's judgment against Robert Forsythe or

other judgment creditor's liens, or of any incumbrance on the premises. See counsel's opinion (page 99, folio 230), that the title was good in Robert Forsythe. See appellee's cross-bill (page 33, folios 68, 69.)

The foreclosure of the trust deed of Robert Forsythe to Scoville, trustee of appellee, the sale thereunder of the premises April 17, 1872, and their conveyance by Scoville, trustee, to Jas. D. Wallace. (Page 5, folio 9; page 49, folio 112; page 88, folio 205; pages 92–93, folio 217.)

Trust deed April 17, 1872, from Jas. D. Wallace to Geo. Scoville, trustee of appellee. (Page 26, folio 52; page 35, folio 73; page 92, folio 217; page 88, folio 206.)

The record is incomplete, as Exhibit "C" of the deed is not contained in it. It was produced at page 88, folio 206.

Foreclosure of the trust deed of Jas. D. Wallace. Sale thereunder May 1, 1876; the premises bid in by the appellee. Execution and delivery to him by the trustee, Geo. Scoville, of a deed conveying to him the premises in fee, duly acknowledged and recorded, and that appellee still is the owner in fee of the same (page 36, folios 78–79.) Appellee's cross-bill not denied in appellant's answer. (See appellee's answer to appellant's bill, page 25, folio 48. See, also, page 93, folios 218–219. Judgment of the court, page 54, folio 124.) Why was this deed not introduced?

Appellant's judgment against Forsythe & Brown was, as averrred (page 2, folio 4; page 47, folio 105), $9,665.49, in March, 1866 (page 57, folio 132; page 58, folio 134; page 79, Cross-Questions 35–36). Writ of *fi fa* immediately issued. May 9, 1870, alias issued. Property was levied on and sold by marshal June 7, 1870 (page 64, folio 147); June 20, 1870 (page 58, folio 34), and Marshall conveyed the same to appellants September 9, 1871. (Appellants' bill, page 4, folio 8; appellants' answer to appellee's cross-bill, page 49, folio 111.)

Appellants in September took possession forcibly (page 70, Questions 26, 27, 28; page 75, Cross-Questions 48–49; appellee's answer, page 24, folio 46), and hold it (page 4, folios 8–9). Answer to cross-bill (page 47, folio 105), not admitted (page 11, folio 22); not admitted or denied (page 15, folio 29). Judgment admitted by appellee's answer and cross-bill, but discharged by Forsythe's bankruptcy (page 23, folio 44; page 37, folios 80–81). Issuing of *fi fa* in 1866 admitted (*id.*); see facts found by the court (page 101, folio 214); that the above judgment was recovered, *alias* execution issued, the property levied on in June, 1870; sold to appellants, a deed executed, and they took possession.

The judgment recovered was, as averred by appellants, for damages for the conversion of certain wheat, &c. (page 2, folio 4; page 47, folio 105); but not admitted by appellee's answer (page 23, folio 44.) The suit was for what "*was due*" to appellants. "On winding up our (their) transactions (with Forsythe & "Brown) the account showed due to us (them) $9,814.55. We "(they) brought suit in 1866 and got judgment for $9,665.49." (Appellant Crawford, page 57, folio 132.) "There was an ac- "count on appellants' books showing *a debit* balance (against "Forsythe & Brown) of $10,000." Geo. S. McKiernan (pages 66–67; question 4, folios 156, 157, 158); (appellants) "declined "paying a draft drawn about that period by Forsythe & "Brown on them for $8,000 *on the ground* that Forsythe & "Brown had not furnished wheat to cover the sums previously "advanced." (*Ibidem.*) McKiernan's testimony (page 67, folio 157) that Forsythe said in September or November, 1865, that appellants' debt should be paid to the last cent is specifically, emphatically and circumstantially denied by Forsythe (page 74, Cross-Questions 17 to 22, inclusive. See pages 69, 70, Questions 11, 12.)

The bankruptcy of Robert Forsythe is alleged in appellee's answer and cross-bill (page 23, folio 44; page 38, folio 83).

His petition was filed in 1866 (page 72, question 64)—in the spring of 1866 (page 75, question 50)—and he was discharged a bankrupt in the spring of 1866 (pages 72, 73, questions 65, 66), or rather in 1868 (page 96, folio 224), and from all his debts (*ibidem*).

The discharge was destroyed in the fire of 1871 (page 73, question 67). All the papers were so destroyed (page 73, admission). Appellants' debt was scheduled (page 62, folio 143; page 76, Cross-Question 51); appellants presumably were notified of the proceedings in bankruptcy (page 96, folio 223). The evidence is imperfect that the appellants did *not* prove their debt (page 58, folio 135). Appellants were engaged in proceedings instituted to set aside the discharge (page 64, folio 148; page 96, folio 223). These proceedings were commenced in 1869 or 1870, after Forsythe's discharge, and were abandoned (page 96, folios 223–224). The property in question was not included among the bankrupt's assets (page 76, Cross-Question 56). In the list of the bankrupt's indebtedness the amount of appellants' judgment was given, and their residence is (only) *believed* to have been given at Pittsburgh, Pennsylvania (page 62, folio 143). Yet appellants had a copy of the list, but never produced it, though requested to do so by *his* solicitor (page 62, folio 143). The bankrupt intended to give the correct address of appellants (Louisville, Kentucky), (page 57, folio 131), in his schedule of indebtedness, and "if "it was therein given at Pittsburgh, Penna., it must have been "a clerical error, for he gave it Louisville." (Page 99, folio 222).

When the appellant's claim is alleged to have accrued against the firm of Forsythe & Brown, on which their judgment was recovered against them, there was no such partnership firm as to appellants (non-dealers), it having been previously dissolved; though their judgment represented a valid debt against Forsythe, yet the proof of its consideration, disclosing that as to him a

fiduciary character does not belong to his indebtedness to the appellants. It is simply a judgment debt which the decree in bankruptcy against him discharged.

The partnership of Forsythe & Brown in the commission business, commenced in the spring of 1865, in Chicago. Page 69, Question 4.) There were no partnership articles (page 97, folio 226.) The terms were, that Brown was to put in $10,000, and Forsythe $20,000, but were never complied with. (*Id.*) Brown was to manage the business, and Forsythe was to attend to his own. (*Id.*) It continued about 60 days. (Page 69, Question 5.) Forsythe left the firm—dissolved the partnership—April 25, 1865 (page 73, Cross-Questions 2–3), "just after business commenced;" and published notice of the dissolution of the partnership as early as April 25, 1865, in three of the principal Chicago daily papers—the Tribune, the Times and the Evening Journal. (Page 73, Cross-Questions 4, 5 and 6.) This was caused by Forsythe's discovery that Brown was doing outside business—speculating. (Page 98, folio 227.) The arrangement of appellants with the firm of Forsythe & Brown was sometime in June or July, 1865, and their last purchase was paid for 30th September following. (Page 59, folio 137.) There were no business transactions between appellants and Forsythe & Brown as late as August, 1865. (Page 73, Cross-Question 7.) The letters signed "Forsythe & Brown," and proved to be in Brown's handwriting (page 73, Cross-Questions 8, 9, 10, 11, 12, 13, 14, 15), to appellants, and appearing on pages 80, 81 and 82, show the beginning of their business transactions with Brown (July 29, 1865), and their end September 5, 1865. During the continuance of the partnership Forsythe had no knowledge of any business transactions, either of himself or the firm, with the appellants, nor of the firm's purchasing any wheat for them, nor of the receipt of any money paid. He knew nothing of the matter, except when McKiernan, appellants' clerk, told him in the fall of

1865 or spring of 1866, that such a purchase had been made, when he answered him "that he knew nothing of it" (pages 69–70, Questions 11–12), and when the suit was brought against him as one of the partners. (Page 69, Questions 6, 7, 8, 9, 10.)

Averment in the answer of defendant Jas. D. Wallace, and in that of the defendant Robert Forsythe, and in the answer of the appellee, that the premises were sold March 8, 1872, at public sale by Carol Gaytes, assignee in bankruptcy of Robert Forsythe, were purchased by the defendant Wallace, and that the said assignee executed and delivered to him (Wallace), a deed of conveyance of the said premises of that date, whereby he became vested with whatever interest or title in them had theretofore been vested in said asssignee. (Page 14, folio 28; page 18, folio 36; page 26, folio 60.)

Averment in appellee's cross-bill of a tax title in the premises acquired by John Forsythe fraudulently against appellee's interests. (Page 35, folio 74. See testimony of Wright, page 88, folio 207.) Appellee's agents first knew of John Forsythe's fraudulent and adverse tax title at the sale of the premises May 1, 1876, under Wallace's trust deed to Scoville, appellee's trustee, when he claimed the premises by virtue thereof. (Page 89, folio 209; page 93, folio 218.) Abstract of John Forsythe's tax title. (Page 94, folio 220.) The title enures to the appellee by judgment of the court. (Page 55, folio 127.)

POINTS.

I.

The trust deed from Loomis to Arthur, limited to Robert Forsythe a contingent remainder for life in the lands, dependent on the death, in his lifetime, of his wife, Mary E. Forsythe, without issue. He therefore took no right or interest and no estate in the lands to which the judgment of the appellants could attach a lien.

The uncertainty of the right of enjoyment rendered it a contingent remainder. (2 Washburn on Real Property, 4th Ed., 550, and cases cited; *ibidem* 548, sub. 17.)

To be a vested remainder there must be a *capacity* to take. A capacity means not only a person *in esse*, capable of taking, "but also that there is no intervening circumstance of the na- "ture of a condition precedent." (2 Wash., *supra*, Book 2, Ch. 4, Sec. 1, Sub. 17, and note to Subn.)

The condition which prevented Forsythe's taking a *vested* remainder for life was the death of Mary E. Forsyt
issue. Having no fixed right of further enjoyment,
vested interest.

By the statute of Illinois the term "real estate," on which a judgment shall be a lien, "includes lands and tenements, and "all legal and equitable *rights and interests* therein and thereto, "including estates for life of the debtor," etc.

"But it would seem that it is now settled that when the con- "tingency on which the remainder is to vest, is not in respect "to the person, but event—when the person is ascertained who "is to take if the event happens, the remainder may be granted "or devised, and the grantee or devisee will come *into the*

"*place* of the grantor or devisor *with a chance* of having the "estate." (2 Wash., *supra*, 2 Book, Ch. 4, Sec. 3, Sub. 4, page 562.)

That this doctrine, while allowing in such case the *alienation* of a contingent remainder, does not accord to its grantor a *vested interest* in it, but only a right to grant or devise the possibility of an "interest" or "estate," is directly inferable; the language of the text being "that when the person is ascer- "tained who is to take if the event happens, the remainder "may be granted or devised, and the grantee or devisee will "come *into the place* of the grantor or devisor, *with his chance* "of having the estate"—the grantee or devisee then having *the chance* of a vested interest—*but no vested interest*—that is, the law now allows the person who is to take to *alienate his chance*, but does not go the length of saying that his chance shall, before alienation, be a *vested interest* in the land; or after alienation, in the hands of his grantee or devisee, anything more than a chance to become a vested interest, on the happening of the event. The doctrine does not clothe a contingent remainder with a vested interest in the realty, but allows the person who, on the happening of the event on which it is conditioned, is to take the remainder, to alienate "his chance" of taking it.

This reasoning is sustained by 1 Preston on Estates, 76, cited in 2 Wash., *supra*, 237, who says that "a contingent in- "terest does not give any certain nor any immediate right, nor "any estate in the land." "It gives a mere possibility; a pos- "sibility which is coupled with an interest when the person is "fixed and ascertained." Having denied any immediate right, or any estate in the land to the contingent remainder, it is evident that the *interest* grows out of, and is confined to the possibility with which it is coupled—in fact, is an interest in *a possibility* which "may be devised by will, may be released, "may pass by the bargain and sale of comr. in bankruptcy,"

etc. The statute of Illinois extends the lien of judgments "to "all equitable rights and interests in and to lands and tene- "ments." While it is expressly laid down by Preston that "a "contingent interest does not give any certain nor any imme- "diate right, nor any estate in the land," he concedes to it an interest in *a possibility*, but *not in the land*, "devisable by will, "which may be released," etc.; and by which the devisee or assignee would have only "a chance" of the interest in the *possibility* becoming a vested interest in the land. Preston *supra*, 76, says in confirmation of this construction, that it (the interest) cannot be granted or transferred by the ordinary rules of the common law, though it may be bound in equity by contract.

The authorities to the above effect are abundant.

"If the conveyance be *wrongful*, as by feoffment, fine, etc., "it operates to *bar* the estate, which may be *afterwards* in the "one making it." (3 Wash., *supra*, 4 Ed., 116, sub. 46.)

"So one who has a contingent remainder, an interest by "executory devise, or a possibility like an heir apparent, even "though he may not at common law make a grant of such an "interest by deed so as to pass the same distinctly, may con- "vey the estate out of which *his interest is to arise*, and in such "a manner as this will operate as an estoppel, and prevent his "claiming such interest *when it arises*." (3 Wash., *supra*, 4 Ed., 94, Sub. 15, and cases there cited.)

"In respect to the first (the interest of an executory de- "visee), although, as before stated, it is not a subject of "alienation at common law, it seems to be established that "the contingent and executory estates, and possibilities accom- "panied with an interest, are descendible to the heir * * * "or may, at least, in equity be granted or assigned, and may "be devised by him before the contingency on which they "are to depend takes effect. (2 Wash., *supra*, 4th Ed., 713,

Sub. 1, and numerous authorities cited.) In the case there cited (page 714) in point, it is said:

"The chancellor, in giving an opinion, remarked that this "interest (that of a devisee to a contingent remainder) was in "notion of the law a possibility, which, though the law will "not permit to be granted or devised, may still be released, "as all sorts of contingencies may, to the owner of the land," etc.

"But still, so far from the executory devisee (same with de- "visee of a contingent remainder) taking any estate in the proper "sense of the term, even where the executory devise is depend- "ent on the arrival of a future period only, and not on a con- "tingent event, so that the executory devise is sure to take "effect on the day appointed, the heir will take the *whole fee* "in the interim, and not a mere term bounded by his ascer- "tained continuance of his estate. In case the future interest "is created by deed to uses (as here), the fee will be in him "from whom the land moves and who corresponds to the heir "in case of a devise." "Among the reasons for this doctrine, as "given by Mr. Butler, is that he has not *a vested estate*, as the "whole is vested in the grantor, if the limitation is by deed, or "the testator's heir, if it is by will, till the event happens. He "has therefore no estate, the limitation being executory and con- "ferring on him a certain fixed right to an estate in possession "at a future time." (2 Wash., *supra*, 4 Ed., 715, Sub. 2.)

"A conveyance operating by way of estoppel will bind the "contingent remainder. It conveys no right, there being none, "but by estoppel and estoppel only (4 Kent Com., 12th Ed., "261); it operates by estoppel and estoppel only, and parties "and privies may avail themselves of that estoppel. (4 Kent "Com., 12th Ed., 261, note b; *Doe* v. *Martin*, 8 B. & C., 497.) "But in *Doe* v. *Oliver*, 10 B. & C., 181, it was held, 'that it "did not operate by estoppel *only*. It had an ulterior oper- "ation when the contingency happened. It *then* operates upon

"the estate as though it had been vested at the time the con-
"veyance was made, and the estoppel becomes an estate in
"interest.'

"A contingent remainder is a mere right and cannot be
"transferred before the contingency happens, otherwise than
"by estoppel. (4 Kent Com., 12 Ed., 260.) If there be in
"A and B and to the survivor in fee, a conveyance operating
"by way of estoppel will bind the remainder in fee in the sur-
"vivor. The estate for life is the only tangible interest and
"the other is a mere possibility. (4 Kent Com., 12 Ed., 261,
"*supra.*)

"Contingent interests and those executory not vested may
"be alienated, * * * may be extinguished by feoffment,
"fine, etc., operating by estoppel, or may be bound by estoppel,
"or an assignment to a purchaser will be sustained in equity as
"an agreement, *and when the interest becomes vested* the court
"will, against the vendor, order a conveyance to be made in
"accordance with the agreement.

"The sale of an expectancy in equity is good. (4 Kent
"Com., 12 Ed., 475, note.) The sale of an *expectation* of an
"inheritance is not void, but will be upheld. (*Voreck* v.
"*Edwards*, 1 Hoff. Ch. Rep., 281–395; *Ibidem*, 395–396.) The
"interest which passes by the covenant to settle or assign
"property, which should fall to the covenantor, *is not an interest*
"*in the land*, but a *right under the contract*. Therefore no in-
"terest in the estate in question passed under the bargain and
"sale of the commissioners. (*Carelton* v. *Leigton*, 3 Merivale,
"670, 1805, per Lord ELDON.)

"When a man having no title at the time agrees to sell and
"afterwards such title accrues to him, the court binds the con-
"science of the vendor himself and compels him *to make good*
"*the title at any future period when he can. The land was not*
"*bound.* (*Morse* v. *Faulkner*, 3 Swanston, 429, Note.)

"Courts of equity do not, like courts of law confine themselves to the giving of effect to assignments of *rights and interests* which are absolutely *fixed and in esse*. On the contrary, they support assignments, not only of choses in action, but of *contingent interests and expectancies*, and also of things which have no present, actual or potential existence, but *vest a mere possibility only*. In respect to the latter it is true that the assignment can have no positive operation to transfer *in presenti* property in things not *in esse;* but it operates by way of present contract to take effect and attach to the things assigned *when and as soon* as they come *in esse*, and it may be enforced as such a contract *in rem* in equity. (Per Story Ch.; *Mitchell* v. *Winslow*, 2 Story's Rep., 630. See *Breckenridge* v. *Churchill*, 8 *id.* Wash., 13; *Allstons* v. *The Bank*, 2 Hill's Rep., 242. See American Ch. Dig., 1 vol. [Waterman], title Assignment.)

"A possibility *coupled with* AN INTEREST is devisable when the person in whom THE INTEREST IS TO VEST IN THE EVENT CONTEMPLATED, is known or capable of being ascertained." "Devisable and descendible are convertible terms." (*Pond* v. *Bergh*, 10 Paige, 141–153.) In other words, a possibility coupled with (or to) an interest that is to vest in the event contemplated. This evidently is meant by "a possibility coupled with an interest," as used in the books.

"All contingent and executory interests are assignable in equity and will be enforced if made for a valuable consideration; and it is settled that all contingent estates of inheritance, as well as springing and executory uses and possibilities coupled with an interest, where the person to take is certain, are transmissible by descent and are devisable and assignable. If the person be not ascertained, they are not then possibilities coupled with an interest, and they cannot be devised or descend at common law." (4 Kent Com., 12 Ed., 261, note *a*.)

The rule seems to be that a contingent remainder, viz., that estate in the land, cannot be transferred except by *estoppel* before it becomes *vested as an estate* by the happening of the contingency. But where the person is fixed and ascertained, who on the happening of the contingent event will take the estate, he may devise or assign, &c., his interest in *the possibility* of the happening of the contemplated event, and his assignee, &c., will, on the happening of the event, take the estate limited as a contingent remainder—that is, the fixed and ascertained person assigns and his assignee takes "a chance" of the estate. If the person is not fixed and ascertained, it would seem that equity then contemplates the uncertainty of the person as an obstacle to any interest even in "a chance" of a contingent future estate; and in that case allows to a conveyance of any future estate in the land no other force than that of *an estoppel* upon the grantor should he ever be, and whenever he is, seized. The impossibility that an interest coupled to a possibility of the event happening on which the contingent remainder is to vest should be *an interest in the land*, and not simply *a personal, assignable interest*, is evident when considering that if the event should never happen, there never would be an *estate* to which the interest could be attributed.

"When, however, there is an existing right in one, which "cannot be defeated by the action or volition of another, to a "future estate upon a contingency, there is something upon "which a release might operate. * * * The authors "speak of it *as a right coupled with a contingent interest in real* "*estate.* Such a fixed right to a contingent estate may be "released." (*Miller* v. *Emans*, 19 New York Rep., 384–397.) Then the *interest* is a *contingent interest*, or an *interest in a possibility.*

Therefore, Robert Forsythe, having had a contingent remainder, limited by the Loomis trust deed, although a fixed and ascertained person, had no interest in the land to which the

appellant's judgment could attach a lien. (See the opinion of the court, pp. 102–103; fol. 239–240.)

II.

The appellant's judgment in March, 1866, against Robert Forsythe, as one of the copartnership firm of Forsythe & Brown, was extinguished by Forsythe's discharge in bankruptcy, March 26, 1868.

The consideration of appellant's judgment was simply a commercial debt.

Forsythe was not a member of the firm of Forsythe & Brown when the appellant's claimaccrued.

Forsythe was discharged a bankrupt in 1868.

Forsythe's discharge as a bankrupt was in the spring of 1868. The appellant's judgment was recovered against him in March, 1866. The suit in which the judgment was recovered was for what "*was due*" to appellants "on winding up our "(their) transactions (with Forsythe & Brown.) The account "showed due to us (them) $9,814.55. We (they) brought suit "in 1866 and got judgment for $9,665.49." "There was an "account on appellant's books showing a debit balance (against "Forsythe & Brown) of $10,000." Appellants declined paying "a draft drawn about that period by Forsythe & Brown on "them for $8,000, on the ground that Forsythe & Brown had "not furnished wheat to cover the sums previously advanced." (*Ibidem.*)

The Bankrupt Law of 1841 specifies that "no debt created "by the bankrupt * * * while acting in a fiduciary char- "acter, shall be discharged by proceedings in bankruptcy." The meaning of "fiduciary capacity" (the phrase of the act of 1861), having been judicially construed under the act of 1841,

is carried into the new statute with that meaning. (*Cronan* v. *Cutting*, 4 B. R., 667; Same case, 104 Mass., 245; Bump's Law and Pra. of Bankruptcy, 9th Ed., 744.)

The evidence shows a simple indebtedness, not of a fiduciary character.

If, on the contrary, Forsythe and Brown were commission merchants, they did not as such, hold fiduciary relations with the appellants. (*Chapman* v. *Forsythe*, 2 How., 202; 7 American Law Review, page 32; *Grover & Baker Sew. Mach. Co.* v. *Clinton*, 5 Bis., 324; *Owsley* v. *Cobia*, Legal News of June 16, 1877.)

"A claim against one for withholding the proceeds arising "from the sale of goods consigned to him to be sold on com- "mission, is a debt contracted by him in a fiduciary capacity." (Bump's Law and Pr., *supra*, 9th Ed., 730; seven cases in the state courts are cited for and four cases contra the proposition.)

"A factor who has sold the goods of his principal and re- "ceived the money therefor, does not owe him a debt while "acting in a fiduciary capacity." (Hilliard on Bankruptcy and Insolvency, 294, Sec. 91; *Hayman* v. *Pond*, 7 Met., 328; *Austill* v. *Crawford*, 7 Ala., 335.)

If the original transaction is held to have created a debt of a fiduciary character, the appellant's judgment thereon in March, 1866, merged the contract, and together with it its fiduciary character.

"The cause of action has lost its vitality—expanded its force "and effect. All its power to enforce liabilities and sustain "rights was terminated on the judgment or a decree. It 'is "drowned' in the judgment and therefore must be regarded "as *functus officio*." (Freeman on Judgments, § 215, 2d Ed.)

"All rights and liabilities originally imposed by or growing out "of the instrument or agreement terminate with the judg- "ment." (*Wayman* v. *Cochrane*, 35 Ill., 152, Walker, C. J.;

Hogg v. *Charleton*, 25 Penna., S., 200; *Biddleson* v. *Whitel*, 1 W. Blackstone, 507.

"Whatever the cause of action, it will, if recovered on, "merge into the judgment." (Freeman, *supra*, § 216.) "Every "judgment is a new debt for most purposes. The new debt is "not affected by the character of the old." (*Ibid*, § 217.)

"A simple contract debt is extinguished by a judgment." (*Beasley and another* v. *Palmer*, &c., 1 Hill, 482, 484.) "A "liability *for a tort* is not affected by a bankrupt's discharge. "Otherwise however, if before the petition, the demand had "become a debt, by taking the form of a judgment." (*Beasley* v. *Palmer*, 1 Hill, *supra*, directly in point.)

"A report of references will not give it the nature of a "debt." (*Crouch* v. *Gridley*, 6 Hill, 250, 252, 253.) In *Charles ex parte*, 16 Vesey, 256, 14 East, 197.)

"A defendant indebted on a note, petitioned in bankruptcy. "Subsequently he confessed judgment on the note. *Held*, that "the judgment was a new debt and was not affected by the "discharge. The original debt was merged in the judgment "and extinguished by it." (*Thompson* v. *Hewett*, 6 Hill, 254, 255.)

It is true that the doctrine is questioned by some authorities. Freeman on Judgments, section 245, states that the doctrine of merger is modified in proceedings in bankruptcy, and in *Clark* v. *Rowling*, 3 N. Y., 216, 220, Bronson, J., at page 228, intimates that the cause of judgment may be inquired into. See also *Betts* v. *Bagley*, 12 Pick., 572, 580; *Wyman* v. *Mitchell*, 1 Cow., 316, 319, 321; *Raymond* v. *Merchant*, 3 Cow., 147, 150, 151 on this point. See especially at page 321 of 1 Cow., *supra*, and page 151, 3 Cow., *supra*.

The following are late authorities and seemingly of greater weight on the point under consideration:

"If a fiduciary debt was merged in a judgment prior to the

"commencement of the proceedings in bankruptcy it is released "by a discharge." (Bump's Law and Pr. in Bankruptcy, 9th Ed., 745, 10th Ed., 583. *Wolcott* v. *Hodge*, 15 Gray, 547, 548, and cases cited.)

"A change at any time from a simple contract to a judg- "ment destroys the peculiar privileges which may attach to a "simple contract debt as fiduciary, or as a contract for neces- "saries and the like exempt debts." (15 Gray., *supra*, 548, Bump, *supra*, 9 Ed. 545, 10 Ed. 583). "Applying the princi- "ples settled by the cases cited, it would seem that the ex- "emption from the discharge attaching to an original indebt- "edness, may be lost by the creditor, if he elects to change the "character of the debt by reducing it to a judgment or debt of "record." (*Ibidem*, 15 Gray., 550.

Some of the cases cited are under the Massachusetts insolvency statutes—*i. e.*, 15 Gray., *supra*, and in *Bangs* v. *Watson*, 9 Gray, 211, "to a plea of a discharge in insol- "vency—the plaintiff replied that the debt was within the "provision excluding from the operation of a discharge "'any claim for necessaries furnished to such debtor or his "family.' But it appearing that the original debt was in judg- "ment *before* proceedings in insolvency were instituted, the "claim was merged in the judgment, and no longer the subject "of exemption from a discharge as a claim for necessaries."

It is to be observed that in these cases the exemption claim had passed into judgment *before* the proceedings in insolvency were commenced (as with appellant's judgment before Forsythe's petition in bankruptcy), while BRONSON, J., in 3 N. Y., *supra*, p. 228, supposes that the plaintiff may look into the judgment to learn its consideration "as an answer to an exemp- "tion, or an insolvent law *passed after* the contract was "made." It would seem that if the contract existed when the proceedings commenced, which was the consideration of a judgment obtained upon it *afterwards*, then the contract or con-

sideration of the judgment can be inquired into. But, if *before* the proceedings were commenced, the contract passes into judgment form, that, in such case, the consideration of the judgment cannot be inquired into. (See *Beasley* v. *Palmer*, 3 Hill, 482, and *Thompson* v. *Hewett*, 6 Hill, 284.) The appellants were notified of Forsythe's proceedings in bankruptcy, and the legal inference is that they proved their debt, it not appearing that they did not prove it.

"A judgment creditor who proved his debt in bankruptcy, "thereby lost the lien upon the real estate." (Hilliard on Bankruptcy and Insolvency, 133, Sec. 41.)

The property in question was not scheduled, and appellant's judgment was. There is no proof that the residence of the appellants was not correctly given, at Louisville, Kentucky—Crawford, one of them, only "believing" that it was given at Pittsburgh, Pennsylvania, while testifying that he had in his possession a copy of the original paper, which, though requested by *his* counsel to produce, he failed to produce, and Forsythe testifying that he gave their true residence, which, if not correctly inscribed, must have been the result of a clerical error.

"If the discharge was fraudulent, it cannot be impeached "collaterally, but must be set aside. Bump, *supra*, 10 Ed., 585–"586."

It was unsuccessfully impeached in proceedings taken to set it aside, and in which the appellants were engaged.

When the appellant's alleged claim accrued against the firm of Forsythe & Brown, on which their judgment was recovered, there was no such partnership (as to appellants), it having been previously dissolved. Notice of the dissolution had been published in three of the principal daily newspapers published in Chicago (the place of its business), before the appellants had any dealings with the partnership, and before they commenced dealing with Brown.

Such published notice of dissolution is sufficient as to parties having had no dealings with the partnership firm. (Collyer on Part., Secs. 532 to 535; Story on Part., 7 Ed., 162.) "Notice in "one of the usual advertising gazettes where the business was "carried on, when published in a fair and usual manner, is of itself "notice of the fact to all persons who have not been previous "dealers with the partnership." (3 Kent Com., 12 Ed., 67-68.)

Now, *if* the debt is *not* simply a commercial debt, but is of a fiduciary nature; and *if* it is not merged in the judgment recovered upon it; and *if* the consideration of the judgment may, in case of bankruptcy, be inquired into—then the appellants being permitted to give evidence that its consideration was a debt of a fiduciary character—it follows that the appellee may show by evidence in reply that it was not of that character, but a simple debt discharged of a fiduciary complexion.

"Although a judgment, to some purposes, is considered as "a merger of the former and as constituting a new cause of "action, yet when the essential rights of the parties are influ- "enced by the nature of the original contract, the court will "look into the judgment for the purpose of ascertaining what "the nature of such original cause of action was." (*Betts* v. *Bagley*, 12 Pickg., 572, 580.)

Therefore, though the judgment represented a valid debt against Forsythe, yet the proof bearing on its consideration disclosing that as to him no fiduciary character attached to it, his indebtedness to the appellants was of the nature of a simple judgment debt, from which the decree of bankruptcy fully and finally discharged him.

See statement of facts and opinion of the court, page 101, folio 236; page 103, folio 240: "In 1868, Robert Forsythe took the "benefit of the bankrupt law, and was discharged under the "law." "In 1868, Robert Forsythe became a bankrupt under "the law of Congress."

III.

The agreement between Forsythe and Corwith was a sale on condition, and not a redeemable mortgage. The understanding between them was, not that the deed absolute to Corwith should be a mortgage, but that Forsythe, when able, might purchase the property back.

1st. When Forsythe and Corwith made their arrangement it should be remembered that Forsythe was indebted to Corwith in the sum, in all, of about $17,000 (page 76, Cross-Question 60), and the deed from Corwith to Forsythe was placed in Forsythe's hands to enable him "to raise money for the pur-"pose of paying for *the property*" (page 71, Question 37), "for "the purpose of getting able to purchase it back" (page 71, Cross-Question 33), and that "some weeks" prior to that Forsythe had negotiated the loan in question, and the appellee's agents had agreed that he should have it "provided that he "could get the deed" (page 71; Cross-Question 38); and that on delivery together of the deed of Arthur to Corwith, and that of Corwith to Forsythe, and of Forsythe's trust deed to Scoville for appellee, the $15,000 was paid. (Page 72; Question 45, 46, 47.) pages 85, 86, folios 200, 201. Forsythe, therefore, purposed to use the deed from Arthur to Corwith "to raise money for the "purpose of paying *for the property back* to him" (page 71; Questions 33, 37)—not for the purpose of paying *the debt*, which necessarily was understood to be paid by the conveyance to Corwith. "The understanding or agreement in regard to this "deed (to Corwith) being held *as security* was that if he got "able he was to *purchase it back from him*" (Corwith) (page 71, Question 33); and therefore was it that "there was no agree-"ment that the property should be reconveyed to him (For-"sythe) on the payment of this money" (page 71, Question 35,) and that "there was no arrangement made for a reconvey-

"ance." (Page 71, Question 32.) Corwith agreed "to take the "deed and to hold it, if Forsythe did not pay it." (Page 77, Cross-Question 86.) Forsythe was to *purchase back* if he got able to *redeem* it." (Page 71, Question 33.) *No interest* on the amount to be paid by Forsythe for the property when purchasing it back was spoken of or agreed upon. The method understood by which Forsythe proposed to raise the money with which "to purchase back the property" (page 71, Question 33), which he requested Arthur to convey to Corwith, was that he should procure a loan upon the property *whenever* the title should be in him through the conveyance of Arthur to Corwith and Corwith's conveyance to him. (Page 71, Question 38.) Having effected such an arrangement with Wright & Tyrrell, appellee's agents (page 71, Question 38), accordingly, on the delivery of the deed to Corwith and the deed to Forsythe, and Forsythe's trust deed to appellants, the loan was made by which Forsythe "raised the money for the purpose of paying "Corwith for the property (page 71, Question 37), and so "pur-"chased it back" (page 71, Question 33)—the amount of Forsythe's debt *paid* to Corwith being understood as the consideration of the purchase. That this is the sense which Forsythe, in his testimony, both in chief and cross-examination, attached to and in which he used the words "redeem," "trust deed," "redemption," and "security," appears plainly at page 71, where, on his direct examination (Question 33), he says: "If I "I got able to *redeem it* I was *to purchase it back from him.*" For it is to be observed that on his cross-examination (Cross-Questions 63, 64, page 76; Cross-Questions 86, 87, 88, 89, 90, page 77) he does not once use the words "trust deed," "redeem," "redemption," or "security," except as an adroit counsel thrusts them cunningly into his mouth through leading questions, the answers to which are evidently given with the understanding by Forsythe that the words mean "the right to pur-"chase back," as evidenced by Question 33, page 71, and an-

swer, viz: "What was the understanding or agreement then in "regard to this deed being held as *security?* Ans. If I got "able to *redeem it* I was *to purchase it back* from him." (See Forsythe's answer, page 16, folio 32, and Wallace's answer, page 22, folio 24, denying that a mortgage was intended and averring that Forsythe purchased the property from Corwith. (See Index to evidence.) That he used the words "secure" and "redeem" the same as "purchase back" and as expressive of the right it was agreed that he should have to "purchase back," there is additional evidence in Question 49, page 72: "You may state whether you paid to Mr. Corwith "out of that money all that was *due* him *secured* by the prop- "erty? Ans. No, sir. I believe I left the balance in his "hands." And in Cross-Question 62, page 76: What was the arrangement with regard to redemption to which you have testified in your chief examination? Ans. "That I was "to *redeem it* as soon as *I was able.*" And in Question 33, page 71, and answer: "What was the understanding or agreement, "then, in regard to this deed being held as *security*"? Ans. "If I got able to *redeem* it I was to *purchase back from him.*" He was to *redeem it* by *purchasing it back*; and Corwith was secured by having his debt paid by the property.

Irrespective of this, and construing the intention of the parties by the very words tendered by the appellants' counsel, to the use of the witness Forsythe, the case of *Alderson* v. *White*, 2 De Gex & Jones Ch. Rep., 97, 99, 105, 108, decides the transaction to have been a conditional sale, and not a mortgage. "A conveyed a life estate to B, in consideration of "£4,739. By a deed of even date B contracted that if A "should at any time desire to repurchase the life estate for "£4,739 B would re-convey it to him for that sum. All the "expenses of the transaction were paid by A. B took pos- "session, insured A's life for £4,739, and after payment of the "premium the surplus rent was between £6 and £6 10s. per "cent. on the purchase money.

"B left a will, by which he spoke of the life estate as *re-*
"*deemable* on payment of £4,739 *and interest*, and spoke of his
"interest as a *security*. A, after a lapse of nearly thirty years,
"and many years after the death of the solicitor who conducted
"the transaction, filed a bill to redeem, and failed in proving
"by direct evidence that the parties intended a mortgage.
"Held, reversing the decision of the court below, that the
"transaction was to be treated as a conditional sale, and not as
"a mortgage, and that A had no right to have an account
"of rents and profits," &c.

"It is sometimes difficult to draw the line of distinction be-
"tween a transaction which constitutes a mortgage and one
"where there is a mere right to repurchase on the part of the
"grantor upon certain terms." (2 Wash. Real Property, 4th Ed., p. 56, Sub. 14.) "It is equally competent for the parties
"to give the transaction of a conveyance of land either of
"these characters according to their intention; and the propo-
"sition may be regarded as a general one that a conveyance
"is not a mortgage, unless the grantee intended to make a
"loan upon it as security." (*Ibidem*, 57, Sub. 15, and authorities in foot note.) "This doctrine was applied recently to the
"following facts: One S agreed with plaintiff to convey to
"him, or whomsoever he should direct, certain lands at a cer-
"tain price. Plaintiff then applied to defendant for a loan of
"money, who agreed to make it by advancing and paying to
"S the agreed price of the land and take the title to himself,
"and upon payment of that sum by the plaintiff he would
"convey the land to him; and in the meantime the plaintiff
"was to have possession of the land and pay defendant rent
"for the same. It was held not to constitute a mortgage, but
"that the defendant took the land as purchaser, with the rela-
"tion between him and the plaintiff of vendor and purchaser
"under a verbal contract to convey." (2 Wash., *supra*, 57, Sub. 15.)

Here Corwith was to convey to Forsythe, or whomsoever he should choose. (Page 71, Question 34.) Forsythe applied to appellee's agents for a loan of the money with which to purchase back the property "some weeks" (page 61, Question 38) before. Corwith then handed him the deed of the property to enable him "to raise money for the purpose of "paying him (Corwith) for the property" (page 71, Question 37), appellee, by his agents, having agreed "if I (Forsythe) "could get the deed and give the security to advance the "money." (Page 71, Question 38.) This deed and Forsythe's trust deed, together with the deed of Arthur to Corwith, were subsequently delivered to appellee's agents, and the advance of $15,000 made simultaneously, 15th March, 1870 (page 86, folio 201), Forsythe all the while having possession of the property, and afterwards by his tenant, who paid rent to appellee's agent. (Page 70, Questions 26, 27; page 73, Question 68; page 75, Cross-Questions 44, 46, and page 89, folio 209.)

Now, if the appellee on making the loan to Forsythe of $15,000 had, instead of taking a mortgage from him, taken a deed directly from Corwith, with a promise to convey the land to Forsythe on being repaid the $15,000 loaned, he would be held to have been a *purchaser*, and not a mortgagee. Much more must the verbal contract between Forsythe and Corwith be held a contract for a *repurchase*, and not a *mortgage*, Forsythe the while having possession of the land, and the rent thereof being paid to appellee's agents.

"The question seems to resolve itself into whether there is "a loan and a security therefor, intended by the parties, or a "*bona fide* sale, with a right to repurchase. Thus, where L "who had a verbal promise from P to whom he had conveyed "land, to reconvey it on being paid, &c., applied to W to loan "money on the land, who refused, but offered to take an "absolute deed of purchase from L and P and paid for the

"land, and at the same time gave L a bond to reconvey the "estate within a certain time on being repaid the purchase "money, it was held not to constitute a mortgage, but a right "to repurchase. There was no loan by W to L." (2 Wash., *supra*, 58, Sub. 16; *Flagg* v. *Mann*, 14 Pick, 467.) If W, who advanced the money price on an absolute deed and covenanted with L to reconvey to him, L on payment of his advance is held not to have loaned the money, but to have purchased the land. More clear is it, that P, to whom L had conveyed the land with P's verbal promise to reconvey it to L on being paid, &c., was a purchaser and not a mortgagee. The principle that holds W, who took the deed on advancing the money for L on the deed to himself, to have been a purchaser, rests upon the relations between P and L, raised by their agreement.

Instead of taking a mortgage for the loan of $15,000 to Forsythe, if the appellee had advanced to Forsythe and taken an absolute deed from Corwith, accompanied with a promise to reconvey the land on being paid the $15,000, the transaction would have constituted *not a mortgage* but *a right to repurchase*. So it is equally clear that the understanding that Corwith was to convey to Forsythe on the payment to him an amount in consideration of which it had been conveyed to him, is not a mortgage, but a right in Forsythe to repurchase for a specified sum. The principle that holds the appellee under such circumstances a purchaser and not a mortgagee, rests upon that which pronounces the relations between Corwith and Forsythe, raised by their understanding to be those of vendor and purchaser, and not of mortgagor and mortgagee.

2d. "In several cases it was held that a conveyance in "satisfaction of *a prior debt*, though accompanied by a clause of redemption, was not a mortgage, *but a sale*, with a right to "repurchase depending on whether the debt was extinguished, "or the relation of debtor and creditor remains, and a debt

"still subsists." (2 Wash., *supra*, 59; Sub. 17, and cases cited in foot note.) The cases being directly and strongly in point are given with reference to actual inspection: *Robinson* v. *Cropsey*, 2 Edwards' Ch. Rep., 138; Same case, 6 Paige, 480; *McKinstry* v. *Conly*, 12 Ala., 678; *Poindexter* v. *McCannon*, 1 Dev. Eq., 373; *West* v. *Hendix*, 28 Ala., 226, 234, 235; *Hickox* v. *Lowe*, 10 Califor., 197, 207, 210.

The consideration of the agreement between Forsythe and Corwith was a prior debt. (Page 76; Cross-Question 60.)

Forsythe under the agreement paid Corwith about $7,000, and made personal use of the other half of the money he got of appellee's agents. (Page 77, Cross-Question 84, 85; page 72, Question 48.)

Page 77, Cross-Question 79: "How much did you *pay* "Corwith?" Answer: "I couldn't positively say." Cross-Question 80: "About how much?" Answer: "About one-"half of it."

Forsythe was "to purchase the property back if he got "able," (page 71, Question 33.) "He raised the money for "the purpose of paying him (Corwith) for this said property." (Page 71, Question 37.)

As the purchase of the property back by Forsythe from Corwith depended *alone* upon Forsythe's future ability, the conveyance to Corwith was absolute in extinguishment of the prior debt, in consideration of which it was made; and as the money "was raised for the purpose of paying Corwith for the "property," and not for the purpose of paying the debt, the conveyance to Corwith was for the purpose of extinguishing the debt. That no interest was exacted or agreed to be paid on the sum to be paid by Forsyth to Corwith on "purchasing back" conforms to the understanding of an extinct debt. (See *Hickox* v. *Lowe*, 10 Califor., *supra*, 197, 207, 210.) Therefore, the conveyance to Corwith extinguished Forsythe's debt to Corwith, which no longer subsisted.

3d. The agreement was not that Corwith should reconvey to Forsythe (see Questions 32, 35, page 71), but that Forsythe should "purchase back." (See Questions 33, 34, page 71.) The conveyance to Corwith having been by the donee Arthur, and his grantor being Loomis, the grantor in the trust deed to Arthur, Corwith could not reconvey to Forsythe. (2 Wash., *supra*, 658, Subs. 12, 13.) But supposing the agreement to have been to *reconvey*—"an agreement to reconvey will not "turn an absolute conveyance into a mortgage." (*Alderson* v. *White*, 2 De Gex & Jones, *supra*, 97, 105.)

4th. "Among the circumstances which courts regard as of "great weight in determining whether a sale absolute in its "terms is or is not to be treated as a mortgage, is the adequacy "or inadequacy of the consideration paid. If grossly inade- "quate, it is deemed a strong circumstance in favor of regarding "the transaction a mortgage, *though it is not conclusive.*" (2 Wash., *supra*, 60, Sub. 20, and cases cited in foot note.)

The property consists of three lots, numbered 4, 5, 6, etc., on which was a dwelling house, barn and outbuildings. The house was on lots 5 and 6. (Page 90, folio 210.) The premises were considered to be worth in the spring of 1870, improvements included, $30,000. (Page 91, folio 212; page 76, Cross-Question 59.) The buildings constituted twenty-five per cent. of this estimate. (*Id.* page 91, folio 213.) The barn and outbuildings stood on the land of the Illinois Central Railroad over ten feet (page 90, folio 211), which rendered them valueless. (*Ibidem.*) "When the house was originally built, it was "fit for the locality; but lately, in consequence of a very superb "class of buildings going up, it is totally inappropriate, and "would add little or nothing to the value of the real estate." (Page 91, folio 213.)

"It was a fancy property; it was a fictitious value." (Page 76, Cross-Question 59.) In 1860 or 1861 Forsythe bought it

at fifty-five dollars per front foot ($4,125). (Page 70, Questions 15, 16, 17.)

Page 76, Cross-Question 60: "How much did you owe Mr. "Corwith?" Answer: "Well, I owed him a personal debt of "about seven or eight thousand dollars, and then I was secur- "ity for about that much more—about sixteen or seventeen "thousand dollars." Page 76, Cross-Question 63: "What "was the arrangement with regard to redemption, to which "you have testified in your chief examination?" Answer. "That I was to redeem it as soon as I was able." Page 76, Cross-Question 64: "Redeemed by paying how much?" Answer. "All I owed him."

It seems, therefore, that from a property estimated at $30,000 in the spring of 1870, one-quarter, or $7,500, is to be deducted because of the valuelessness of the house and outbuildings, leaving the estimate at $22,500. Now, if the fact that it was "a fancy property"—"a fictitious value"—is considered, there could be no unreasonableness attributed to a purchaser, if he should decline to purchase at a "fancy" or a "fictitious" price, a piece of property that ten years before had been valued at only $4,125, and bought for that sum. Therefore it cannot, under such circumstances, be concluded that the price of the property fixed at about $17,000 was unreasonable. Certainly it was not grossly inadequate. That it does not appear that Forsythe actually paid the full sum of the price agreed on (page 77, Cross-Question 84; page 87, folio 203) does not disturb the agreement to pay Corwith about $17,000 for the property; especially as he states (page 72, Question 49), that "he did not pay him out of the "moneys *all* that was due him."

"Inadequacy of price *alone* will not convert an absolute con- "veyance into a security for the repayment of money." (*West* v. *Hendrix*, 28 Ala., *supra*, 235, and cases there cited.)

5th. Forsythe's agreement with Corwith was told by him to Wright & Tyrrell, appellee's agents. (Page 78, Cross-Question 90.) "They were aware of it." (Wright's Testimony, page 87, folio 203.) The evidence proves, and the authorities hold, that Forsythe was "to purchase back" the property with the money he got from the appellee. The deed from Arthur to Corwith, and from him to Forsythe and his to appellee, and the payment of the money, were one act *at the time* when Forsythe was in possession of the property. (Page 70, Questions 25 to 29; page 73, Question 68; page 75, Cross-Questions 44, 45.) He took from appellee the money to purchase back the land (pages 85, 86; folios 200, 201; page 77; Cross-Question, 77) and paid from its rents the interest on the money he got from the appellee to "purchase back" the property. (Page 77, Cross-Questions 71 to 74; page 89, folio 209.) His possession *then and afterwards* was notice to the appellee of his "purchase back" of the property. "Pos-"session is notice to a *bona fide* purchaser of the equities of the "occupant." (*Grimstone* v. *Carter*, 3 Paige, 421, 439.)

6th. The donee of a general power may appoint to himself (2 Wash. Real Prop., 4 Ed., 659; Sub. 16) and husband and wife to each other. (*Id.* Sub., 15.) If Forsythe and wife are to be considered as grantees (donees) of the power, they had a general power and could designate either or both of themselves for appointment by Arthur under the power. The property, the subject of the power and trust, was bought with Forsythe's means, when free of debt, and worth $20,000. The benefit of Forsythe and wife, it plainly appears, was "the intent of the donor" of the power. If the appointment to Corwith was intended as a mortgage, it was for the benefit of Forsythe and blended with a trust in his behalf and did benefit him, not only by enabling him to pay his debt to Corwith, but invested him with the fee of the property (Index 6, pages 3, 8, 7; page 5) by which means he realized the pay-

ment of his indebtedness and the one-half of appellee's loan of $15,000 to his personal use. (Page 77, Cross-Questions 78 to 85 inclusive; page 87, folio 203.) The intent of the grantor (donor) of the power, as disclosed by the original instrument was therefore subtsantially accomplished by the execution of the power in Corwith. If intended as a mortgage, the appointment to Corwith was a valid execution of the power in law, and if in equity "it is but a partial execution only," the court can and should supply or correct the defect by holding the power well executed in Corwith.

"Equity often interposes to correct or supply a defective "execution of a power when there has been *a substantial com-* "*pliance with its terms.* As, where the interest is what was "authorized by the power, and where there is merely a defect "in the matter of form, and the principal intent of the donor "will be accomplished by carrying the execution into effect." (2 Wash., *supra*, 676, sub. 1; Story on Equity Jur., §§ 169–175; Sugden on Powers, *supra*, 8th ed., 553, ch. 11, sec. 1, sub. 9; Laussat's Fonbl. Eq., 238, 239, and notes; Williams on Real Property, 248, 249; 4 Cruise's Dig., 222 *et seq.;* Burt. Real Property, § 1559; *Wilkinson* v. *Getty*, 13 Iowa, 159; *Sinclair* v. *Jackson*, 8 Cow., 581.)

"A power, though exhausted at law, may be partially exe- "cuted in equity. Thus, if a man having a general power of "appointment or revocation, *appoint to one in fee by way of* "*mortgage*, the power is wholly executed at law; but as equity "considers a mortgage merely a security for the debt, in equity "it operates as a partial execution only." (Sugden, *supra*, 8th ed., 273, ch. 7, sec. 6, sub. 34.)

The appellee was a *bona fide* purchaser for a valuable consideration. (*In re* How, 1 Paige, 128; *Tallman* v. *Farley*, 1 Barbour, 285.) He advanced $15,000 to Forsythe on the faith of the fee unencumbered, of the land in him, the opinion of counsel being to that effect. This sum was received and ap-

propriated by Forsythe to his personal use and benefit. (Rec., page 77, Cross-Questions 78 to 85, inclusive; page 87, folio 203), as obviously was designed by the original instrument containing the power and therefore not inequitably to other persons. The intention and object of the power were not defeated, but were carried out even if the agreement between Forsythe and Corwith be considered a contract to mortgage and not to purchase back the property.

"Thus a defective execution will be aided in favoring per-
"sons standing upon a valuable or meritorious consideration,
"such as a *bona fide* purchaser for a valuable consideration, a
"creditor, wife, child, &c.; unless, indeed, such aid of the de-
"fective execution would, under all the circumstances, be
"inequitable to other persons, or it is repelled by some counter
"equity. (Story Equity Jur., 11 ed., § 169.)

"In all these cases it is to be understood that the intention
"and objects of the power are not defeated or put aside; but
"that they are only attempted by the party to be carried
"formally into effect." (Story Equity Jur., *supra*, 11 ed., § 175.)

7th. "A further requisite of what would be considered a
"sufficient defeasance in form to convert an absolute deed into
"a mortgage, is that it should be made to the grantor himself;
"if to a stranger, or to the grantor and a stranger, it would
"not have that effect (*Flagg* v. *Mann*, 14 Pick., 467; 2
"Black's. Com., 327; *Low* v. *Henry*, 9 Cali., 528); as where a
"clause in the deed of grant gave a stranger a right to redeem
"by paying a certain sum of money, agreeably to a bond given
"by the grantee to this stranger, it was held not to constitute
"a mortgage of which the obligee could avail himself (*Warren*
"v. *Lovis*, 53 Maine, 463); though if the grant be by the
"husband and wife, of the wife's estate, a defeasance made to
"her alone would constitute it a mortgage." (*Mills* v. *Darling*, 43 Maine, 365; 2 Wash., *supra*, 60, sub. 21.) Inspect cases

cited, viz: *Flagg* v. *Mann*, 467–479, and cases cited at 479; *Mills* v. *Darling*, 43 Maine, 565; *Treat* v. *Strickland*, 23 Maine, 234; *Warren* v. *Lovis*, 53 Maine, 463; *Low* v. *Henry*, 9 Cali., 538, 549, 551, and cases cited; 2 Bl. Com., 327, 342.

Forsythe, to whom it is contended that the defeasance was made, was a stranger. Corwith's grantor was William R. Arthur, the donee of a power blended with a trust, to convey the land to him, Corwith, the person designated by Forsythe and wife to whom he should convey it, in pursuance of a deed of trust from Horatio L. Loomis to said Arthur, March 30, 1861, containing the power, in trust, to convey the land in fee simple, absolute, to whomsoever the said Forsythe and wife should so designate (page 79, folio 184.) Arthur, the donee of the power, was merely an instrument acting with the concurrence of Forsythe and his wife jointly, and some of whom are related to the seizin of the lands, the appointee Corwith being in by the original instrument, 30th March, 1861, and taking the fee directly from Loomis 2 Wash., *supra*, 658; Subs., 12, 13).

"It has been established, ever since the days of Lord COKE, "that where a power is executed the person taking under it "takes under him who created the power, and not under him "who executed it." (Sugden, *supra*, 479, Ch. 9, Sec. 4, Sub. 3–6, and cases cited; *Doolittle* v. *Lewis*, 7 John. Ch. Rep., 45–48; *Bradish* v. *Gibbs*, 3 *Id.*, 550; 4 Kent, *supra*, 327, 328, 337, 338, 12 Ed.; 2 Wash., *supra*, 578, Sub. 26; *Id.*, 658, Subs. 11, 12, 13.)

"Every instrument of execution operates as a direction of "the use, and the appointee takes in the same manner as if the "use had been limited to him in the original settlement creating the power. The use declared by the appointment is fed "(to use the mysterious language of the conveyancers) by the "seizin of the trustee to uses in the original conveyance." (4 Kent Com., 12th Ed., page 328; *Marlboro* v. *Godolphin*, 2 Vesey, 78.)

Forsythe, therefore, to whom the defeasance is alleged to have been made by the agreement between him and Corwith, was not "the grantor himself," but a stranger.

8th. A mortgage, where there is a power both of appointment and revocation, operates in equity, *pro tanto*, as a revocation (Sugden, *supra*, 8 Ed., Ch. 7, Sec. 6, Sub. 35, p. 273). If no power of revocation is contained in the power, revocation is not possible (4 Kent Com., 336). Revocation must be revived by the appointment. (2 Wash., *supra*, Book 2., Ch. 6, Sec. 7, Sub. 10, p. 670.) A mortgage vests no estate in the mortgagee. The equity doctrine is, that it is a mere security and only a chattel interest. Until foreclosure, the mortgagor continues the real owner of the fee. (4 Kent Com., *supra*, 159–160, and cases cited in note b; 12 Ed. Story's Equity Jur., § 1016; 2 Wash., *supra*, 4 Ed., 105, 106; *Karnes* v. *Lloyd*, 52 Ill., 117.) Though, where a power is unrestricted, a less estate than directed may be appointed (4 Kent Com., 345; Sugden, *supra*, Ch. 8, Sec. 2, Sub. 39), yet a mortgage being no estate, cannot be appointed save by way of *revocation*, and then the power of revoking must be contained in the power. Arthur had no power of revocation of the appointment of the fee, or a less estate, had he appointed it. The intent of the donee governs. (4 Kent Com., 345; Sugden, *supra*, 452, 453.) Arthur appointed the fee. As courts lean to the execution of the power, and as the execution accords with the intent of the donee, the court will not determine that the deed of a fee absolute to Corwith, which he could appoint, was a mortgage, which he could not appoint.

9th. Forsythe owed Corwith about $17,000. (Page 76, Cross-Question 60.) The property was conveyed at the request of Forsythe and wife, by Arthur to Corwith "*to secure*" him the money that Forsythe owed him. (Page 71, Questions 30, 31.) "*To secure him*," meant that Corwith was to have the property for his debt, on the condition that Forsythe might,

when able, "purchase it back." (Page 71, Question 33.) "Q. What was the understanding or agreement then, in regard "to this deed being held *as security?* A. If I got able to redeem "it, I was to purchase it back from him"—"by paying *all* I "owed him, viz., $17,000." (Page 76, Cross-Question 64.) Then to enable Forsythe to raise the money to pay Corwith for the property back (page 71, Question 37), Corwith handed him a deed of it, to show Wright & Tyrrell, appellee's agents, in consequence of their having "some weeks" (page 71, folio 168, Question 38) before agreed to loan for appellee $15,000, "if he could get the deed and give them *the security*." (Page 71, Question 38.) "The security" that was to be given besides the deed, to be got from Corwith to Forsythe, was what counsel (Walker, Dexter & Smith) required should be done before the title would be good in Forsythe (page 86, folio 102), viz: that Wright & Tyrrell "should get two deeds, one from "Wm. R. Arthur to Nathan Corwith, and the other from Na- "than Corwith and wife to Robert Forsythe. This being done "and put on record," their opinion was "that the title would "*then* be good in Robert Forsythe *at date thereof*."

In compliance with this agreement, Corwith or Forsythe came to Wright & Tyrrell, and one or the other "*at the time* "*the loan was made* and *before* the money was paid" (page 85, folio 200), "put into their hands the deed not yet recorded" of Arthur to Corwith, dated January 4, 1870, and the deed of Corwith to Forsythe "not yet recorded," dated March 12, 1870. (Page 85, folio 200.) These deeds when recorded, counsel's opinion advised Wright & Tyrrell (page 86, folio 202; page 99, folio 230), would make the title good in Forsythe. They were delivered and recorded, together with the trust deed of Forsythe to Scoville, appellee's trustee, at the same time, March 15, 1870 (page 86, folio 201), when, also, the money previously negotiated and agreed to be advanced by Wright & Tyrrell for appellee was paid. "The deeds were put in our

"hands (Wright & Tyrrell) *either by Nathan Corwith or Robt.* "*Forsythe* at the time we made the loan, and before we paid out "the money. (Wright's testimony, page 85, folio 200.) "I did "not get my money from Wright & Tyrrell until I had ac- "knowledged that trust deed." (Forsythe's testimony, page 77, Cross-Question 77.) At the same time Forsythe delivered the deeds he got the money of Wright (page 72, Questions 46, 47) and paid a portion of it to Corwith. (Page 72, Question 48.) When Forsythe got the $15,000 of appellee he paid about half of it to Corwith. (Page 77, Cross-Questions 78, 79, 80.) Then Forsythe paid about one-half, or about $7,000 of the money he got from appellee's agents (Wright & Tyrrell), to Corwith (page 77, Cross-Questions 80–84), or about $10,000 (page 87, folio 203) at the same time that he got the $15,000 from appellee.

The facts then are, that Forsythe owed a debt to Corwith, and desiring to pay it, agreed with Corwith, that if a loan could be got on the property, he would request Arthur to convey the property to Corwith in payment, if Corwith would agree that Forsythe might purchase back for what he (Corwith) gave for it, when he (Forsythe) was able, it being understood by them both that the way in which the money was to be raised to enable Forsythe "to purchase the property back;" the way "of raising money for the purpose of paying Corwith "for this property" (page 71, question 37), was to get a loan upon it; and so it was arranged and understood by them, that the conveyance should be made by Arthur to Corwith, and by Corwith to Forsythe, only to be used in their application to parties for a loan to satisfy them that the security offered for the loan would be good. Accordingly, the deeds being shown and the abstract of title, and counsel's opinion advising that where simultaneously delivered and recorded, the title would be good in Forsythe, appellee's agents thereupon agreed to advance $15,000 on the security thus proposed to be made, on the simultaneous delivery and the record of a trust deed from

Forsythe for the amount of the loan, etc. Under this agreement, on the 15th of March, 1870, either Forsythe or Corwith delivered the deeds from Arthur to Corwith, and from Corwith to Forsythe, and Forsythe's trust deed to appellee's agents, who thereupon recorded them all at the same time, and paid Forsythe's money loan. Forsythe *then* and simultaneously paid Corwith the sum, or a part thereof, to be paid him for the purchase of the property back, and retained a part of the loan for his own use.

It is evident that the conveyance of Arthur to Corwith, and that of Corwith to Forsythe, took effect only on their delivery to appellee's agents, together with Forsythe's trust deed, and on filing the same for record, *when* payment of the money to Forsythe was made, and *when* Forsythe paid his indebtedness to Corwith, all of which were simultaneous, and was one indivisible act. On the instant that Corwith took the fee of the property, his debt was paid to him by Forsythe, and the $15,000 were paid to Forsythe by appellee. On the same instant Forsythe purchased and took the property back, the fee of which, on the same instant, passed into the trustee of appellee, Scoville, by Forsythe's trust deed to him. There was no interval of time of which a mortgage can be predicated, and over which it could extend. The title passed instantaneously, by Arthur's conveyance to Corwith, and from Corwith to Forsythe, and from him to appellee.

The recording of the deeds (if there was no other evidence of the fact) at the same time, is presumptive evidence that they were simultaneous acts, etc. (See *Cunningham* v. *Knight*, 1 Barbour, 399-406, and other numerous authorities cited to the above proposition.) In this sense, Robert C. Wright's testimony coincides (page 87, folio 203) with Forsythe's, that his indebtedness to Corwith was paid by Arthur's "deed to him," "and that "the major part of the money was to be paid to "Corwith by Forsythe for Corwith's *deed* to him."

IV.

The execution of the power by Arthur was valid (Index 3, page 2, 4; page 3, Record, page 42, folio 92, etc.; opinion of the court, page 102, folio 238; page 103, folio 240) and vested the fee of the land in Corwith, under whom appellee claims. "The "trustee * * * executed a deed to Corwith January 4, "1870, and it is under this deed that the defendant Cochrane "claims." (Page 102, folio 238.) "It seems to me that any in- "terest which he (Forsythe) had in the land at the time the "judgment was obtained, was liable to be divested by the ap- "pointment and execution of the power named in the deed of "trust." (Page 163, folio 240.) "The only estate that he (For- "sythe) at any time has had, has been by virtue of the execu- "tion of the power under the appointment jointly by his wife "and himself."

Robert Forsythe was one of two persons on whose joint consent depended the execution of the power by Arthur, the donee; as such, he possessed no interest in the estate limited by the trust to Arthur, to which a judgment creditor's lien could attach.

"There is a distinction between the executor of a power, "viz., the donee and a third person who consents to its execu- "tion. They both do not sustain the same relations to the "power, that is, both are not grantees. The power is in no "respect vested in the third person consenting, and can only "consent to another executing it. The power is vested in the "grantee (donee) of the power, not in the persons by whose "consent it is executed." (*Barber* v. *Carey*, 11 N. York, 397-401-402-403.)

1st. It is an intangible, incorporeal right, the same as if it did not exist. (Sugden on Powers, 8th Ed., 252, Ch. 7, Sec. 5, Sub. 9, Wilm. Notes, 36.)

Chance says (1 Chance on Powers, p. 725) that "for "many purposes at least, such parties" (parties of consent to the execution of powers) "may be considered as the donors of "the powers. If it be the meaning of a power that it shall "not be executed without the consent of another, it is clear "that both at law and in equity, the consent must be "obtained: this is the very essence of the execution. It is sub- "stance and not form." It is apparent, however, that they are not related *to the estate*.

The donee is the "conduit pipe" through which the seizin of the grantor of the power passes to the appointee. (2 Wash. Real Prop., 4 Ed., 658, Sub. 12 and cases cited.) The "ab- "solute discretion or option of consent cannot be questioned, "compelled or controlled—no more than any event made an "arbitrary condition precedent to the execution of a power." (Sugden on Powers, 8 Ed., Ch. 7, Sec. 5, Sub. 21-22, 258, 280.) "It is a personal obligation." (Sugden, *supra*, Ch. 7, Sec. 5, Sub. 7–18.) There is no distinction between "appro- "bation" "advice;" "*direction*"—all are conditions precedent. (Sugden, *supra*; 1 Chance on Powers, paragraph 731-742.) *In re Brereton* v. *Brereton* (2 Vesey, 87) Lord Hardwicke said "it could not be done, and a bill against trustees who hap "a discretionary power to consent or not, was never ad- "mitted," and cases there cited.

The donee may delegate the execution of the power when it is tantamount to ownership. (Sugden, *supra*, 188, Ch. 6, Sec. 2, Sub. 6; 2 Wash., *supra*, 4th Ed., 664–665–689; and see 660, to assigns.)

The consentor cannot delegate his power of consent: "It is a personal obligation." (Sugden, *supra*, 8th Ed., 256, Ch. 7, Sec. 8, Sub. 7–18.)

An infant cannot execute a power except it be simply collateral. (2 Wash., *supra*, book 2, Ch. 6, Sec. 5, Sub. 1.) An infant *donee* cannot devise by lease under a power to do so.

(Bacon's Abridg. "Lease"; *How* v. *Whitfield*, Thosdon, 110; 1 Ventr., 339; 2 Show, 57; 13 Petersdorff., 652, note.) If the power is given an infant by will, he cannot execute it, for he cannot make a will. (2 Wash., *supra*, 658; Sugden, *supra*, Ed. 1856.)

An infant consentor may consent.

A donee must be capable of taking seizin. (2 Wash., *supra*, book 2, Ch. 6, Sec. 5, Sub. 1.)

A consentor need not be.

A *feme sole donee* may execute a power, but only while *sole*, if given when *sole*. (13 Peters' Diff., 623.) In other cases she may. (2 Wash., *supra*, 4 Ed., 653, 654.)

A *feme sole* consentor may consent at any time. Consentors, therefore, though "for many purposes considered as donees of "powers" (Chance, *supra*), differ in many respects from them.

But the *donee's* power "is a mere incorporeal right, and "and while it remains incapable of being exercised is to every "intent and purpose the same as if it did not exist." (Sugden, *supra*, Ch. 7, Sec. 5, Sub. 9.) The appointor and the parties of consent must *concur* before there can be an appointment.

"When two or more are named as donees, all must join in "the execution of the power." (2 Wash., *supra*, Book 2, Chap. 6, Sec. 5, Sub. 20; Story's Equity Jur., § 1062.)

"The death of one of two parties whose consent is necessary "to the execution of a power, destroys the power." (Sugden, *supra*, Ch. 7, Sec. 5, Sub. 8.) "But if consent were given in "life it is good." (*Id.*, Ch. 7, Sec. 5, Sub. 15; *Lee* v. *Vincent*, Cro. Eliz., 26.)

If the power of the *donee* before it is executed is "the same "as if it did not exist," the same is true of the power vested in the person whose consent is required to the execution of the power by the donee. If the donee of the power and the par-

ties whose consent is the condition precedent of his appointment must "concur," and if all whose consent is required must *unite* in the consent, should it be held that there is in the persons whose consent is required to the execution of the power, an appreciable interest in the estate, to which a judgment lien can attach, by what rule can that interest be determined and how can it be divided between Robert Forsythe and Mary E. Forsythe, the two *joint* consentors, and how apportioned between them and Arthur, the donee of the power? Had Mary E. Forsythe died without giving her consent, Robert Forsythe would have had no power of consent, and his consent, therefore, would not have supported the execution of the power by Arthur, the donee, which in that event would have failed. How, then, is it possible to separate the fraction of a right to consent from an integral right of consent in R. Forsythe jointly with Mary E. Forsythe, and to locate the same when partitioned in Robert Forsythe as a defined portion of the joint power, when upon the death of Mary E. Forsythe unconsenting, his consent would be void and of no effect? Besides, if Forsythe had such an interest, it was an *interest* taken by him jointly with his wife as such, and therefore as an estate by entirety was in himself and wife indivisible. In such case had he conveyed the interest during coverture and died, the wife would have taken the whole as survivor (2 Wash., *supra*, book 1, Chap. 13, § 6, Subs. 1, 2, 3) a thing impossible of a power of joint consent.

"A court of equity will not control a trustee's decision and "compel him to consent." (Sugden, *supra*, Ch. 7, Sec. 5, Sub. 21, and cases cited in note.)

"A power of consent cannot be delegated." (Sugden, *supra*, Ch. 7, Sec. 5, Sub. 7–18; *Hawkins* v. *Kemp*, 3 East., 420.)

It would seem that that which is so personal that it cannot be delegated, so sacred that equity cannot control it, so impal-

pable "as if it did not exist," has not substance enough nor body to which a judgment creditor's lien can be affixed.

2d. Even had there been an interest in Forsythe, as such joint consentor, and liable to the lien of appellant's judgment, it had no existence *before* consent given. All the cases hold there to be no interest *before* consent given. (2 Wash., *supra*, book 2, Chap. 6, Sec. 8, Sub. 1; 1 Fonblanque Equity, b. 1, Ch. 1, Sec. 7; Prects. in Chancery, 232, S. C.; *Lassells* v. *Cornwallis*, 2 Vesey, 465; Sugden, *supra*, Ch. 6, Sec. 3; *id.*, Ch. 11, Sec. 6, Sub. 2, page 588; 1 Story's Equity Juris., 12 Ed., Secs. 169, 170, 170a.) *Some of weight* hold that, not even *after* execution of the power will equity interfere. (1 Story Equity Juris., 12 Ed., Sec. 126, Note 4; 4 Kent Com., 339, 340, 341.) At page 500, 2 Kinney's Compendium of Law, and Story's Equity Jur., 11 Ed., Sec. 176, Note 3, will be found a strong opinion to the above effect. "The distinction is a nice "one, and not very satisfactory," &c. Should it be held that he had such an interest *after* consent given (November 3, 1869), appellant's judgment had then been extinguished by Forsythe's discharge in bankruptcy in 1868. (Statement of facts by the court, page 101, folio 236; opinion of the court, page 103, folio 240.

Though an estate created by the execution of a power takes effect in the same manner as if it had been created by the deed which raised the power (Kinney's Compendium of Law, 409; 2 Wash., *supra*, 132, Ch. 6, Sec. 1, Subs. 7, 8), yet it takes effect from its execution, and not its creation. (2 Wash., *supra*, Book 2, Ch. 6, Sec. 8, Subs. 4, 5; *id.*, Ch. 4, Sec. 3, Sub. 26, page 578.)

Before consent given, equity cannot control it, and *before* the power is executed equity cannot compel it, and whenever executed the estate created takes effect *only from the time of its execution.* Then there was nothing in Robert Forsythe and

Mary E. Forsythe, joint consentors, before their consent was given, which equity could touch, and nothing in Arthur, the donee, *before* he executed the power, which equity could touch; and whatever interest, right or estate there was in each, whether as joint consentors or as donee, took effect only on the execution of the power. But, when the power was executed, appellant's judgment had been extinguished by Forsythe's discharge in bankruptcy. Therefore, while it was in life, and before Forsythe's discharge, there was no interest in Forsythe to which a judgment lien could attach; and if Forsythe took any interest or estate by the appointment to Corwith, he took the same after his discharge in bankruptcy had extinguished appellant's judgment, and, consequently, when they had nothing to attach to any interest that Forsythe might have.

3rd. "If the donee is at liberty to appoint to whom he pleases, "it is a *general* power. If he is restricted to an appointment "to or among particular objects only, it is a *special* power." (2 Wash., *supra*, 641, book 2, Ch. 6, Sec. 1, Sub. 4; 4 Kent Com., 318–328.)

Arthur's power was to appoint, not to whom he pleased, but to the object or objects whom R. and M. E. Forsythe should jointly designate. His power, therefore, was *special*. The power must be *general* that will allow chancery to seize the property for payment of the donee's creditors. (2 Kinney's Compn. of Law, 500.) "Property over which such a dominion "is exercised by virtue of a *general* power, was considered "an absolute property so far as to be liable for debts; but if it "be a particular power to appoint for third persons designated "in the power, and not for the benefit of the donee of the "power, the conclusion would be otherwise." (4 Kent's Com., 340. Sugden, *supra*, Ch. 9, Sec. 3, Sub., 11.)

The theory is untenable that the power here is *general*, for the reason that the consentors, having had the option of desig-

nating who should be made by the donee the appointee of the power, are to be considered the same as donees of the power; it being necessary that the consentors and the donee should *concur* before there could be an appointment under the power. (Sugden on Powers, *supra*, Ch. 7, Sec. 5, Sub. 9). To pronounce the power *general* on the ground that the consentors were sole donees of the power, would be inconsistent with the fact that Arthur is named by the trust deed as *donee* of the power with direction to appoint to a *specified* object. Robert and Mary E. Forsythe's powers, as supposed sole donees of a *general* power, would therefore be incompatible with those of Arthur, a donee with a *special* power, and Arthur's instrumentality *as donee*, indispensable as it is to the concurrent action of himself and Robert and Mary E. Forsythe, (necessary to the valid execution of the power,) forbidding his dismissal as *donee*, it follows that the theory must be rejected, that Robert and Mary E. Forsythe, the two parties jointly clothed with the option of consent, are sole donees of the power. (See *Barber* v. *Casey*, 11 N. York, 397--401--402--403.)

After the consent was given, November 3, 1869 (Index 3, page 2), the condition of consent was extinguished (Sug., *sup.*, Ch. 3, Sec. 5, Sub. 23, p. 258; *id.* 328, Sub. 2; *Hutcheson* v. *Hammond*, 7 Bro., C. C., 128; *Brown* v. *Woodruff*, 32 N. York, 355; see *Jones* v. *Mason*, 13 Barbour, 461,) and the power then became unconditional in the donee, Arthur. (Abbott's N. Y., Dig. "Trusts," p. 26, paragraph 267; *Hall* v. *Winckeild*, Hobart, 195; *Wright* v. *Delafield*, 23 Barbour, 498, 25 N. York, 266.)

The character of the power is determined by that of the power with WHICH THE PERSON IS CLOTHED TO WHOM THE POWER IS GRANTED, viz, ARTHUR, THE DONEE, by whom the power was to be executed, and through whom the title passed as through "a conduit pipe," from the grantor of the power (Loomis) to the appointee, Corwith. (See 2 Wash., *supra*, 641,

Sub. 4; 4 Kent Com., 318–328; *Barber* v. *Carey*, 11 New York, 397–401, 402–403.) In this case it is the nature of the power (a special power), with which the donee (Arthur) was clothed, that governs the character of the power. For these reasons, too, no other rule can possibly be applied in determining the character of the power than that which refers exclusively to the character (whether general or special) of the power granted and in the hands of the donee.

But should it, notwithstanding, be held that the power is a *general* power, and in the consentors, R. and M. E. Forsythe, jointly and alone, the lien of appellant's judgment against Robert Forsythe could not be fixed upon the land *before* their consent was given (November 3, 1869), at which time it had been extinguished by Forsythe's discharge in bankruptcy. (See statement of facts and opinion of the court, Record, page 101, folio 236; page 103, folio 240.)

4th. The written request of Robert Forsythe, jointly with Mary E., his wife, was necessary to the execution of the power, which was "executed under the appointment jointly of "his wife and himself." (Opinion of the court, page 103, folio 240.) When Robert Forsythe made the written request, November 3, 1869, his wife, Mary E., was living. (Mrs. Forsythe died on or about January 1, 1870; statement of facts by the court, page 101, folio 236.) He *then* had only a contingent remainder, *dependent upon* the death of his wife without issue, and therefore no interest in the property. (Opinion of the court, page 102, folio 239; page 103, folio 240.) "The trustee complied with the request and executed a deed "to Corwith January 4, 1870, and it is under this deed that "defendant Cochrane claims. It will be seen from the terms "of the deed of trust that Robert Forsythe had only a "contingent interest in the property, dependent on the fact "whether the wife should die without issue in her husband's "lifetime. The contingency not having happened upon which

"Robert Forsythe could claim the estate, independent of the "joint appointment by himself and his wife, named in the deed "of trust, what was the effect of the judgment upon the inter- "est, if he had any, in the land? I do not see how, under "the circumstances of the case, it could operate as a lien upon "the land, as was the case in *Doe* v. *Britain*, 2 Barnwell & "Anderson, cited by plaintiff, and the only estate he at any "time has had has been by virtue of the execution of the power "under the appointment jointly of his wife and himself."

V.

The agreement between Forsythe, one of two joint consentors, and Corwith, the appointee of the power, if for the benefit of Forsythe. did not invalidate the execution of the power, supposing him to have been the donee of a general power and responsible to the rules which bind such donees.

1st. "If a donee or appointor derives a benefit from the "appointment, the execution of the power is good." (Story's Equity Juris, Sec. 255, note 2, 12 Ed.) A donee may be benefitted by the appointment. He may appoint to himself if he has a general power (2 Wash., *supra*, 659, 4th Ed.), and husband and wife may appoint to each other. (*Id.* 659, Sugden on Powers, 8th Ed., 471, Ch. 9, Sec. 3, Sub. 4.)

The understanding between Forsythe and Corwith was that a debt due from Forsythe to Corwith, in all about $17,000, should be paid by the appointment of the fee in the lands to Corwith, and that Forsythe, when able, should have the right of purchasing the property back from Corwith at the price at which Corwith took it.

2nd. But the appellee was a *bona fide purchaser for a valuable consideration*, and as such, the execution of the power by the

donee, Arthur's, appointment to Corwith, and Corwith's conveyance to Forsythe, and Forsythe's trust deed to appellee's trustee, passed to appellee a fee unaffected by the lien of appellants-judgment, supposing it not to have been previously extinguished by Forsythe's discharge in bankruptcy.

"A mortgagee is a purchaser to the extent of his interest in "the premises within the meaning of the term purchaser as "used in the statute of frauds." (Potter's Will and Equity Cases, 445, star page 444; *Ledyard* v. *Butler*, 9 Paige, 132.)

"Mortgagees who have advanced money on the credit of "the land are *bona fide* purchaser." (*In re* Howe, 1 Paige, 128; *Tallman* v. *Farley*, 1 Barbour, 235.)

The facts proved by the evidence are that the appellee paid $15,000 purchase money for the land in question to Forsythe Corwith conveying the same to Forsythe and Forsythe simultaneously mortgaging the lands to secure the purchase money paid by the appellee.

The facts in evidence are that the appellee paid $15,000 for the land in question to Forsythe, Corwith conveying the same to Forsythe, Forsythe simultaneously mortgaging the land to secure the purchase money paid by the appellee. It appears that it was agreed that the fee of the land should be conveyed by Arthur to Corwith in satisfaction and payment of Forsythe's debt to him. And that Forsythe, with the moneys got from the appellee on his trust deed to appellee's trustee, Scoville, should have the right of purchasing the property back from Corwith. It further appears that the several deeds from Arthur to Corwith and from Corwith to Forsythe, and Forsythe's trust deed for appellee, were simultaneously delivered and filed for record, and the purchase money thereupon paid to Forsythe by appellee's agents on the opinion of counsel (Walker, Dexter & Smith) that the title to the fee was then good in Forsythe. It does not appear, nor is it claimed that appellee or his

agents had any notice of appellant's judgment against Forsythe. On the contrary the record search showed that there were on judgments against him nor incumbrances on the land.

Now, suppose Forsythe, instead of one of two persons whose joint consent was a condition precedent to Arthur's appointment, to have been the sole donee of *a general power*, who in place of Arthur, appointed to Corwith, the appellee, deriving from Corwith, the appointee, under a *bona fide sale for a valuable consideration*, with no notice of a judgment against Forsythe, or of his indebtedness to any person. To the above facts on this supposition the following well settled elemental law based upon adjudicated cases applies.

"But equity goes a step farther, and holds, that when a "man has *a general power* of appointment over a fund, and "he actually exercises his power, the property appointed shall "form part of his assets, subject to the demands of his credit "tors," etc. (Sugden on Powers, *supra*, Ch. 9, Sec. 3, Sub. 11.)

"Although creditors in these cases (see the subdivisions in "Sugden immediately preceding this, and including Sub. 11, "above quoted) prevail over volunteers (appointed), yet if a "party taking under a volunteer appointment sell to a person "*bona fide* and for a valuable consideration, such person "* * * will be preferred to the creditors as having a pre-"ferable equity to them. Sir Wm. Grant observed that in the "case of an appointment of property over which a man has "power unlimited as to objects, he who pays a consideration to "a voluntary appointee may constructively be held to be in the "same situation as if he had in the first instance paid it to him, "by whom the power has been executed. But in such case the "claim of the assignee, he observed, was allowed to prevail, "not against persons who had antecedently any specific estate "or interest in the subject of the appointment, but against "creditors who had only a general equity to have what was

"appointed to a volunteer, considered as assets if wanted for "the payment of debts." (Sugden on Powers, *supra*, 8th Ed., page 477, Ch. 9, Sec. 3, Sub. 16.) As confirmatory of this, see Sugden, *supra*, page 512, Ch. 11, Sec. 1, Sub. 35. * * "An appointment at first impeachable as voluntary may *ex post* "*facto* be turned into an appointment for *a valuable considera-* "*tion*, but that is when a valuable consideration was all that "was wanting to have made it good *ab initio*, as in the case "of an appointment of property, over which he has a power "unlimited as to objects, he who pays a consideration to the "voluntary appointee may constructively be held to be in the "same situation as if he had in the first instance paid it to him "by whom the same has been executed." (1 Merivale, 638. Sir Wm. Grant.)

Ibidem, Sec. 36. "These observations, however, although "they bear upon the general principle, apply to cases, not of "defective executions, but of executions which might have "been defective, or the benefit taken away, unless sustained by the claimant filling the character of a purchaser." 1 Merivale Ch. Rep., 634–638 (in point at page cited); *George* v. *Milbanke*, 9 Vesey, 190–196 (in point); *Hart* v. *Middlehurst*, 3 Atkin, 377; *Martin* v. *McNamma*, 4 Drury & Warren, 411.

The above doctrine does not depend on the question of notice. If the appellee had had notice of the appellants' or other judgments against Forsythe, still would he be protected under this authority as a *bona fide purchaser for a valuable consideration.*

1 Merivale Ch. Rep., 634. "It is not a question of notice."

George v. *Millbank*, 9 Vesey, 196. Notice not made a point.

Sugden on Powers, *supra*, 8th Ed. 477, Ch. 9, Sec. 3, Sub. 16—question of notice or no notice not entertained, but good faith and valuable consideration alone.

VI.

Forsythe having no interest in the land by the contingent remainder, limited to him by the trust deed to Arthur, and appellants' judgment, therefore, having had no lien upon the land, supposing their judgment not to have been extinguished (as it was—Point II, page 22), a lien could attach under it only when Corwith conveyed to Forsythe. Appellants claim to have levied on the lands conveyed to Forsythe by Corwith (their bill, page 4, folio 8; answer to cross-bill, page 49, folio 111); to have sold them and to have taken the marshal's deed for them. (See Index.) They therefore deriving by the marshal's sale and deed title under and through Arthur's conveyance to Corwith, Forsythe's grantor, are bound by the recitals in Arthur's deed to Corwith of the due execution of the power. Consequently, they are estopped to impeach or deny it.

"Recitals in a deed of land estop parties and privies." (4 Kent Com., 12 Ed., 261, note b.; Story, Justice, in *Carver* v. *Jackson*, 4 Peters, 83; *Jackson* v. *Parkhurst*, 5 Johns., 128.)

"The recital in the deed of the grantee of the power to the "appointee of the power of the consent of the third party, is "good as to the appointee or privy, and so enures to the benefit "of purchasers in good faith, for a valuable consideration."

"When a party is estopped by a deed, all persons claiming "under or through him are equally bound by the estoppel." (*Stow* v. *Wyse*, 7 Conn., 242; 4 Kent Com., *supra*, 261, note b.)

So a party who traces his title through a regularly executed deed of conveyance is concluded by its recitals. (3 Wash. on Real Prop., 4 Ed., 100, Sub. 26, and cases cited: *Scott* v. *Douglass*, 7 Ohio, 227; *Carver* v. *Jackson*, 4 Peters, 85; *Douglass* v. *Scott*, 5 Ohio, 194; *Hale* v. *Orvis*, 35 Iowa, 366.

The case of *Stow* v. *Wyse*, is stated (Wash., *supra*, 100, Sub. 26), as follows:

"One made a deed of land belonging to a corporation, in "which he described himself as agent, duly authorized to con- "vey, etc., although this was not true. After that he sued and "recovered judgment against the company, and levied his exe- "cution upon the same lands, as belonging to the company, "and then brought his action to recover the land from the "grantee, under the deed which he had executed as agent. It "was held that he was estopped to deny that he was the "authorized agent, and that all persons claiming through or "under him were equally estopped."

3 Wash., *supra*, 4 Ed., page 102, Sub. 30, gives substantially the facts and opinion of the court in *Douglass* v. *Scott*, 5 Ohio, 197. It is sufficient to abbreviate the facts. Douglass, the plaintiff, derived title under a judgment and a creditor's lien, and a sale against one Kerr. Scott, the defendant, derived title by a sale under the foreclosure of a mortgage on the land, given by Kerr subsequently to the plaintiff's judgment against him. The deeds of conveyance through which Kerr derived title recited that a patent of the land had been issued to one Massie, and that Massie had conveyed by deed to Kerr's grantors. Douglass brought a bill in equity to quiet his title The court say: "The obligation created by estoppel not only "binds the party making it, but all persons privy to him, *the "legal representatives of the party, those who stand in his sit- "uation by act of law*, and all who take his estate by contract, "entered into in his stead, are subjected to all the consequences "which accrue to him. It adheres to the land, is transmitted "with the estate; it becomes a muniment of title, and all who "afterwards acquire the title take it subject to the burden "which the existence of the fact imposes on it."

Among other rulings the court holds, therefore, that it was proved that the land was patented to Massie and conveyed by

him to Kerr's grantors (the Montgomery heirs), by the admission of said grantors, while they were owners, and were disposing of the estate "upon which all persons deriving title under "them have a right to rely, and which conclude all persons "to whom their estate is transmitted;" "and that neither party "deriving title through this deed is at liberty to question these "facts." This case seems conclusive on the point under consideration.

Cases cited at 3 Wash., *supra* (Sub. 30); *McClaskey* v. *Leadbetter*, 1 Ga., 551; *Denn* v. *Brewer Coxe*, 172; *Denn* v. *King*, id., 432; *Kinsman* v. *Loomis*, 11 Ohio, 475.

VII.

The power being a power with but *a single object*, and not a power with *several objects*, the agreement between Forsythe and Corwith, supposing Forsythe a sole donee of the power, even if corrupt, would not have vitiated the execution of the power, it being only an "illusory execution of powers," where there are several objects, that fraud is held to defeat them.

In those cases, viz., where there are several objects of a power, as in case of uses raised in behalf of children, and not in cases with one object only, the decision (Sir Wm. Grant's) is put upon the ground of fraud practiced by the appointor, and the appointee, who is one of the objects of the power upon the interests of the remaining objects of the power, and also of those interested in default of the appointment. But this last ground is repudiated by Lord Hardwicke's judgment in *Lane* v. *Page*. (Sugden on Vendors, 8th Ed. Ch., 12, Sec. 2, Sub. 15, 9, 11, pages 610–612. See also, to same effect, 1 Story's Equity Juris., 12 Ed., Sec. 252.)

Independent of these considerations, it is to be observed that

neither Mary E. Forsythe nor Arthur, whose concurrence was necessary to the execution of the power, appears to have been privy to the agreement between Forsythe and Corwith.

"Although the appointor derives a benefit, when the execu-"tion of the power is for the benefit of all the objects of the "power, it is good." (Story's Equity Juris., 12 Ed., Sec. 255, note 2.)

Here there was but one object of the power designated. (opinion of the court, page 102, folio 238. Statement of facts by the court, page 101, folio 235.) There were no other objects to be defrauded; and Forsythe being the contingent remainderman interested in default of the appointment cannot avail himself of his own fraud. (Story's Equity Juris., 12 Ed., Sec. 255, note 2; id., Sec. 252; Sugden, *supra*, 8th Ed., ch. 12, Sec. 2, Subs. 1, 5, 8, 11, pages 610, 612.) And Mary E. Forsythe had no children *in esse* when the power was executed. Nor is there evidence in the record that Leonard Forsythe and Lydia T. Warrick had any *in esse* (Record, page 3, folio 5, pages 7, 8; folio 16) interested as remainderman of the fee limited upon the death of Robert Forsythe.

VIII.

The agreement between Forsythe and Corwith was in terms a condition annexed without authority to the execution of the power, and as such void, leaving the execution of the power good.

The agreement was that a debt due from Forsythe to Corwith, of about $17,000 should be paid by the appointment of the fee of the lands toCorwith; and that Forsythe, when able, should have the right of "purchasing back" the property from Corwith at the price Corwith took it at.

The agreement raised an unauthorized condition which did not affect or impair the execution of the power.

"In cases of unauthorized conditions, the condition is pro-"nounced void and the appointment is held good." Chance on Powers (1,547); *Roberts* v. *Dixall*, cited there; *Brown* v. *Nisbett*, 1 Cox, 13. (See Record, pages 6, 7; folios 13, 14, 15.)

"If the donee of a power in undertaking to execute it annex "conditions to the estate he creates which are not authorized "by his power, the estate will be absolute, and the conditions "void." (2 Wash., *supra*, 4 Ed., pp. 668, 669, Sub. 6, and cases in foot note.)

"It is further observable that a condition cannot be annexed "to an estate created under a power without an express au-"thority. So if a parent having a power to appoint money "among his children and qualifies his appointment to one of "them with the condition that he shall release a debt or pay a "sum of money, the appointment will be absolute, and the "condition void." (13 Petersdorff Abridg., Title "Powers," 625; *Pawlet* v. *Pawlet*, 1 Wils., 224; *Burleigh* v. *Pearson*, 1 Vesey, 281; *Alexander* v. *Alexander*, 2 Vesey, 240.)

"Conditions annexed to the gift not authorized by the power, "the gift is good, and the condition void; so the appointee "takes the fund absolutely—as if an appointment be made and "a condition annexed to it that the appointee shall release a "debt owing to him, or pay money over, the appointment "would be absolute and the condition void, (Sugden, *supra*, 8th "Lon. Ed., Ch. 10, Sec. 3, Sub. 1, 2, 3, p. 526), because the "boundaries between the excess and proper execution are pre-"cise and apparent." (2 Vesey, 644; 1 Atkins, 564; *Burleigh* v. *Pearson*, 1 Vesey, 281; *Hewett* v. *Lord Dacre*, 2 Kee., 622.)

See Sugden on Powers, Ch. 10, Sec. 3, Sub. 11, noticing the case of *Robinson* v. *Hardcastle*, 2 Term Rep., 241. See *Bailey* v. *Lloyd*, 5 Russ., 330, where the donee of a power ap-

pointed the estate by his will, charged with the payment of his debts, which he had no authority to do, and where Mr. Justice BUTLER said, "this might render the whole execution of the "power void." (Says Sugden) "There is, however, no author- "ity for this. If the estate had been given to the object of the "power upon condition that he paid the donor's debt the ap- "pointment would have been good even at law, and the con- "dition void. This case is in effect the same, and would, it "should seem, receive a similar decision. At any rate, in "equity, the excess only in the appointment would be void."

It would seem, therefore, that the agreement between Forsythe and Corwith (assuming Forsythe, the donor), whether a contract to mortgage or to purchase back was void, as a condition unauthorized by the power, and therefore powerless to impair the valid execution of the power, which vested the fee absolutely in Corwith.

IX.

The power to Arthur was blended with a trust intended by the trust deed containing the power for the benefit of Robert and Mary E. Forsythe. Had Arthur refused to appoint to Corwith upon this designation by them, Chancery would have obliged him to do so, not only notwithstanding, but for the benefit of Robert and Mary E. Forsythe, or either of them.

"Sometimes powers and trusts are blended. A man may "be invested with a trust to be effected by the execution of a "power given to him, which is in that case imperative, and if "he refuse to execute it and die without having executed it, "equity, on the general rule that the trust is in the land, will "carry the trust into execution at the expense of the remain- "derman, and without any regard to the person in whose favor "it is to be executed, being *a mere volunteer*, and not a pur-

"chaser, creditor, wife or child." (Sugden, *supra*, 8th Ed., 189, Ch. 2, Sec. 6, Sub. 3; *id.*, 589, Ch. 11, Sec. 6, Sub. 5. See statement of facts by the court—Record, page 101, folios 234, 235, page 102, folio 238, opinion of the court.)

X.

Robert Forsythe was declared a bankrupt in 1868. If Forsythe, as one on whose joint designation the appointment to Corwith was made, be *the donor of the power*, his bankruptcy in 1868 would not invalidate his execution of the power in 1869.

Forsythe, as one of two joint consentors, had no interest as such in the property, which was subject to the powers (see Point IV, page 37; 1st division, page 38; 2nd, page 41; 3d, page 42; 4th, page 44;) nor any right, interest or estate in it under the limitation to him of a contingent remainder by the original trust deed. (Opinion of the Court, page 102, folios 239, 240.)

Then Forsythe, whether as consentor or donee, had a power "extrinsic and totally unconnected with any interest in the land;" that is simply a collateral or naked power. (2 Wash., *supra*,) 4 Ed, page 641, book 2, Ch. 6, Sec. 1, Sub. 13; *id.*, page 639, book 2, Ch. 6, Sec. 1, Sub. 9.)

"The donee of such a power cannot by any act whatever "extinguish or release it." (*Ibidem.*)

"It cannot be suspended or destroyed by an act of the "donee." (*Ibidem*, page 643, Book 2, Ch. 6, Sec. 2, Sub. 1.,

In *Badham* v. *Mee*, 7 Bing, 695, the power was in *the tenant for life*, with remainder to him in fee in default of appointment, and it was held that after his bankruptcy the power ceased.

In *Jones* v. *Winewood*, 4 Mees. and Wels., 663; S. C. 10 Sim.,

150; *Badham* v. *Mee* was overruled, and it was held that under a power of joint appointment in husband and wife, the estate in default thereof limited to them successively for life, with intervening remainders, and remainder over to the husband in fee, the husband becoming insolvent, and having conveyed to his assignee, the power was not destroyed. But in a later case, *Hole* v. *Escott*, 2 Keen, 444, where the estate was settled to the use of the husband for life, remainder to such children the husband and wife should appoint, and in default of appointment to the issue living at the death of the survivor, it was held that after the husband's bankruptcy, the power could not be executed. (These cases will be found noted in Sugden on Powers, 8th Ed., Sup. pages 75, 77, 78; Chap. 3, Sec. 3, Subs. 28, 29, 30.)

In *Doe* v. *Britain*, 2 Barn. and Ald., 93, a trader seized of an estate for life, with the general power of appointment, with reversion in default of appointment to himself in fee after bankruptcy, executed his appointment to an appointee. Held, that all his interest having passed to his assignees, the appointment was void.

In all these cases *the donee* of the power was *the life tenant*, with a remainder in fee which passed to his assignee in bankruptcy by his own, or the act of the law. He was the *donee*, a power appendant. But Forsythe at his bankruptcy had no right, interest or estate in the land opinion of the court, pages 102, 103, folios 239, 240), his power being a naked or collateral power—a power in gross.

"Powers in gross are such as one who has an estate in "land, has to create such estates only, as will not attach on the "interest limited to him, or take effect out of his own "interest, as where a tenant for life has a power to create an "estate which is not to begin till his own ends. It is a power "in gross, because the estate for life has no concern with it."

(2 Washburn, *supra*, 4 Ed., page 639, book 3, Ch. 6, Sec. 1, Sub. 10.)

"Powers appendant are where the donee executes out of "the estate limited to him, and depends upon the estate which "is in him." (*Ibidem*, page 639, Sub. 9.)

"If the power comes within the class of appendant powers, "as above defined, the donee may suspend or extinguish it "constructively by his own act, and the result does not differ "whether the alienation is by the act of the donee of the "power or of the law. Thus, if the tenant for life, having a "power to lease, conveys his entire estate; and if he becomes "a bankrupt the transfer in bankruptcy divests him of his en-"tire estate, and the power of appointing a remainder is extin-"guished." (*Ibidem*, *supra*, 2 Wash., 644, book 2, Ch. 6, Sec. 2, Sub. 4; *Doe* v. *Britain*, 2 B. and Ald., 93; opinion of the court, page 102, 103, folio 239, 240.)

"If the power comes within the class of powers in gross, "as above defined, the donee may execute his power, though he "may have aliened his own estate. Thus, a tenant for life, with "a power of appointment as to the reversion, may execute his "power though he may have aliened his own life estate, and where "an estate was settled to the use of H for life, remainder to "the children of H, with a power to trustees to sell the estate "during the life of H, at his request, H having conveyed his "estate, requested the trustee to convey to his grantee, who "did so: and it was held to be a good execution of the power, "as H by his deed did nothing in derogation of the estate of "such grantee to be derived from the trustees." (*Ibidem*, 2 Wash., *supra*, page 644, Book 2, Chap. 6, Sec. 2, Sub. 3, and cases in foot note.)

But Forsythe was not the *donee* of the power, but only one of the persons of consent. There is no case in which *a life tenant*, being only a party of consent, it is held that by his

bankruptcy "his personal obligation" of consent passed to his assignee. "There is a distinction between the executor of a "power viz., the *donee* and a third person who consents to the "execution. They both do not sustain the same relation to the "power—viz., both are not *grantees*. The power is in *no re-* "*spect vested in the third person consenting*. He can only consent "to another asserting it. The power was vested in *the grantee* "*of the power* (the donee), *not in the person* by whose consent "it is executed." (*Barber* v. *Cary*, 11 New York, 397, 401, 402, 403.)

In this case, whether Forsythe or Arthur had the power, was it, as to either or both, not an appendant power, but *a power in gross?*

Therefore, Forsythe, though decreed a bankrupt in 1868, could designate, in 1869, to whom Arthur should appoint, and had Arthur been previously declared a bankrupt, he could, notwithstanding, have executed the power in 1870. (Opinion of the Court, page 102, folio 239; page 103, folio 240; Sugden, *supra*, Ch. 6, Sec. 2, Sub. 15.)

In *Holdsworth* v. *Goose*, 29 Beavan, 111, and *Eisdell* v. *Hammersley*, 31 *Id.*, 255 (both later cases than those cited above from Bingham, and Mees. and Wels., and Sim. and Keen, and B. & A., viz.: 1861, 1862), where the power of sale was given to trustees, with consent of the tenant for life, the power was held exercisable after the bankruptcy of the tenant for life, by the trustees, with the assent of the tenant for life and his assignee, and (in the latter case) with the assent of the person who had purchased the interest of the tenant for life of his assignee in bankruptcy. (See conveyance by Gaytes, Forsythe's assignee in bankruptcy, to Wallace, and Wallace to appellee, Index to evidence.)

The cases in Beavan differ from those previously cited, in that *the life tenant* in these last had only "the personal obliga-

"tion" of consent, whereas, in those he was *donee of the power of appointment*. The cases in Beavan, therefore, are supported by the consideration that the person who *consents* is not the *grantee* of the power, but the *donee* of the power is its *grantee*, and therefore his assignee in bankruptcy takes what the *donee had*, but does not take what the *party with the consent had not*. (See *Barber* v. *Carey*, 11 N. York, 397–401, 402, 403, *ante*; *Maundrell* v. *Maundrell*, 10 Vesey, 246; *Martin* v. *Smith*, 56 Barbour, 600.)

XI.

The execution of the power by Arthur was valid and vested in Corwith with a fee simple absolute in the land, which cut off and defeated all the estates limited by the deed of trust to Arthur. (Opinion of the court, page 102, folio 238; page 103, folio 240.) A few words may be prefaced on points, which though understood not to have been dwelt upon in the Circuit court, may possibly be insisted on now.

1st. Mary E. Forsythe, one of the two persons to whom was jointly given the power of designating to Arthur the object of his appointment having executed the consent with Robert Forsythe November 3, 1869, died in Noyember, 1869, or on or about January 1, 1870. (Statement of facts by the court, page 101, folio 236.) Her death was not a revocation of the consent. The consent given the power in Arthur became unconditional and complete. (Sugden, *supra*, 8th Ed., 328, Ch. 7, Sec. 5, Sub. 2; *Id.* 258, Ch. 7, Sec. 5, Sub. 23; *Hutcheson* v. *Hammond*, 31 Bro. C. C., 128; *Brown* v. *Woodruff*, 32 N. York, 358.) The power survived.

No case holds that a power conditioned with a consent cannot be executed after consent given in life, though the consenting party have died before the execution of the power. Otherwise where death prevents the consent. (Consent in life is

good, though dying before the execution of the power. 1 Chance on Powers, 267, Sub. 734.) Consent may perhaps be given after the execution of the power. (*Id.* 267, Sub. 736; 2 Vesey, 78, 610; *Roach* v. *Wadham*, 6 East., 289.) A power given on a contingency may be executed before the event happens. (Sugden, *supra*, Ch. 7, Sec. 6, Sub. 21, page 269.) The assent of the party whose consent is required given during life, the execution of the power after his death is good. (Sugden, *supra*, Ch. 7, Sec. 5, Sub. 15. See *Lee* v. *Vincent*, Cro. Eliz., 26; also 856.) Godfrey stating the case, 4 Eliz., if the assent of A reqaired, be given during his lifetime, it were good after his death. (See 4 Kent Com., 333, note b; 1 Leon., 286; Dyer 219, pl. 8, S. P., marginal authorities of case.)

The recital in the deed of the donee to the appointee of the consent of the third party is good as to the appointee and against all privies, and enures to the benefit of a purchaser in good faith for a valuable consideration. (*Hall* v. *Winckfield*, Hobart, 195; *Wright* v. *Delafield*, 23 Barb., 498; 25 N. York, 266; Abbott's N. Y. Dig. "Trusts," page 24, paragraph 267; Sugden, *supra*, 319, Sub. 8; Abbott's National Dig. "Powers.") The cases are misquoted.

2nd. A trust and a power in trust may exist in the same deed. "The same person may hold the estate in trust for one "purpose and at the same time be a grantee of a power in "trust to be executed or take effect at some future day for "another." (*Belmont* v. *O'Brien*, 12 N. York, 404; Prest. Abstract, 104, 158, 159; *Boyce* v. *Hanning*, 2 Cr. & Jer., 334; Chance on Powers, Nos. 313, 314, 315, 321, 322, 323; Sugden *supra*, 179, 180, 483, 493.)

3rd. The consent was November 3, 1869. "As soon as "the said court shall decree that said—be reformed as prayed, "then in that event we hereby request you," etc. (Index 3, page 2), and the deed was recorded November 6, 1869. (Record, page 3, folio 6; page 43, folio 94; page 79, folio 185.) The

reformed deed was duly subjected to the action of the request. "The consent required to the execution of the power should "therefore be so given as to form part of the same transac- "tion. It is of course not necessary that the consenting party "should execute before or at the same time with the party exe- "cuting the power." (Sugden, *supra*, 8th Ed., Ch. 7, Secd. Sub. 15, cites *Vincent* v. *Lee*, Croke's Eliz.) "Perhaps in "many cases there may be no objection to the consent being "given sometime after the execution by *the donee*." (1 Chance on Powers, 736 division.

The execution of the power cut off and defeated all the estates limited in the deed of trust to Arthur.

"There is a mode of creating future estates by what is called "a power of appointment. For instance, if A by his will de- "vises to B for life with a power to B or some other person "named, to appoint or declare who shall have the estate upon the "death of B. When such appointment or designation is made, "the appointee takes under the will of the testator, operating "directly upon the estate, in the same manner as if the testator "had named as devisee the person appointed to take the estate. "Sometimes the testator gives such a power in his will and "then devises over the estate to take if the power shall not be "exercised. Limitations of the latter kind are regarded re- "mainders and as vested, though *liable to be defeated*, if the "appointment shall be made to another; for until it is made, "the possibility that it will be executed does not create any es- "tate, and therefore produces no effect upon the other limitations, "even though the power be to appoint a fee. When exercised "its effect is merely to defeat the estate limited, and to divest it "from him to whom it has been given." (2 Wash., *supra*, 4 Ed., 578, Book 2, Ch. 4, Sec. 3, Sub. 26, and cases cited.)

Mary E. Forsythe took a life estate, subject to the execution of a power, and which the execution of the power *defeated*, together with all the estates limited and the trusts raised in the

deed of trust to Arthur, inclusive of Robert Forsythe's. Arthur's appointment to Corwith was January 4, 1870. Mary E. Forsythe died in November, 1869, or on or about January 1, 1870.

If he took a life estate at her death, it was *divested* by Arthur's appointment to Corwith January 4, 1870. If, however, as the Circuit court holds (see opinion of the court, page 102, folio 239; page 103, folio 240), the appointment took effect November 3, 1869, during the life of Mary E. Forsythe when Corwith was designated as the object of appointment to Arthur by Robert and Mary E. Forsythe jointly, Forsythe *then* having no vested interest in the lands, his contingent remainder with the other estate limited finally ceased and was cut off.

The direction on which, as on a condition precedent, depended the power of the donee, Arthur, to appoint, were complete November 3, 1869. The power became *then* unconditional and complete in the donee (Sugden, *supra*, 328, Sub. 12; *Brown* v. *Woodruff*, 32 N. Y., 355), and could not be divested in any other way than that one provided by the deed which created the power. (Abbott's N. York Dig., Title Trusts, 211, paragraph 267.)

So that, from the date of "the designation," November 3, 1869, Forsythe's interest under the trust deed ceased, and the estate could not be divested save by the action of the donee as directed by the trust deed.

The execution of the power extinguished and cut off all the trusts in the trust deed. Arthur held the property "in trust, "that upon the order and request of Mary E. Forsythe and "her husband jointly he was to convey it to any one they might "designate" (opinion of the court, p. 102, folio 238), and "whenever that should be done, the estate would be exe- "cuted in the appointee, and the trusts before vested "would be divested, and no disposition could be

"made by those who possessed the legal estate that would "not be subject to the operation of the power whenever "executed." (4 Kent Com., 12 Ed., 327, 328, and cases cited; Litt., Sec. 169; Co. Litt., 113 a; *Cook* v. *Duckerfield*, 2 Atk., 562, 567; *Marlborough* v. *Godolphin*, 2 Vesey, 78; *Middleton* v. *Crofts*, 2 Atk., 661.) "When the power is executed the "title rests upon the act creating the power and takes effect as "if created by the original deed." (*Doolittle* v. *Lewis*, 7 John. Ch. Rep., 45, 48; *Bradish* v. *Gibbs*, 2 John. Ch. Rep., 550; 4 Kent, *supra*, 327, 328, 337, 338; 3 Wash., *supra*, book 2, Ch. 4, Sec. 3, Sub. 26, page 578.) Lord HARDWICK, in *Marlboro* v. *Godolphin*, *supra*, 2 Vesey, 78, "the person "takes in the same manner as if the power and the instrument "executing the power had been incorporated in one instru- "ment, and as if all that was in the instrument executing "had been expressed in that giving the power." (See 2 Wash, *supra*, 4 Ed., page 658, book 2, Ch. 6, Sec. 5, Subs. 11, 12, 13, and authorities cited.) Therefore, the power having been executed, "the estate was executed in the appointee" (Corwith), and the trusts vested before the execution of the power by the trust, and "were divested by the execution of the power." See *Nodine* v. *Greenfield*, 7 Paige Ch. Rep., 544, the chancellor holding that a vested remainder in fee is subject to be defeated by the execution of a power of sale given to the executors by the will. In *Doe* v. *Martin*, 4 Term Rep., 59 (one of the cases cited in *Nodine* v. *Greenfield*), Lord Kenyon, supported by Lord Hardwick, in *Cunningham* v. *Moody*, 1 Vesey, 174, affirms the divesting of vested remainders in fee and their destruction by the execution of a power in the hands of the life tenant in possession. In *Oakley* v. *Busy*, 1 Ball & Beatty, 53, there was a devise to A for life of an estate (a case *per autrie vie*) with power to will it to B and his lawful issue in such manner as A shall think proper, and in case A die intestate, then to B and his lawful issue, with remainder to plaintiffs. This is a

vested estate tail in B liable to be divested by the power in A. A and B can by deed bar the remainder. In *Campbell* v. *Watson*, 8 Hammond (Ohio), 498, cited in Freeman on Judgts., Sec. 172, it was held that anything which destroys the legal estate and the intermediate equitable estate defeated the remainders dependent upon them. "The execution of a power defeats the "right of dower." (13 Petersdorff Abridg., page 642, and note; *Ray* v. *Berry*, 5 B. and A., 651; *Doe* v. *Jones*, 10 Barn. & Cress., 459; see 2 Wash, *supra*, Book 2, Chap. 4, Sec. 3, Sub. 26, page 252.)

"An estate may be devised liable to be defeated with a "power given by the testator of appointment to another; for "until the appointment is made, the possibility that it will be "exercised does not create any estate. * * When exer- "cised its effect is merely to defeat the estate limited, and "to divest it from him to whom it has been given." (2 Wash., *supra*, 578, Book 2, Ch. 4, Sec. 3, Sub. 26.)

"The execution of the power cuts off all prior estates and all "judgment liens upon them, although the purchaser had notice "of the judgments." (4 Cruise Dig. Title, 32 Deed, Ch. 17, Sec. 91.)

"Immediately on the execution of such a power (powers "with estates limited in default of appointment) the estates "limited in default of appointment cease and are defeated, and "the estate limited under the power takes effect from the time "of the execution of the power in the same manner as if they "had been contained in the deed creating the power." (Sugden, *supra*, 479, Chap. 9, Sec. 4, Sub. 3; see Index 1, page 1; Record 8, 42, 99.) That on execution of the power the trusts shall cease and be cut off. (*Morris* v. *Mowatt*, 2 Paige Ch. Rep., 586, 590.) The lien of a judgment may be displaced by the execution of a power. (*Morris* v. *Mowatt*, 2 Paige, 590; 2 Sugden on Vendors, 392; *Doe* v. *Jones*, 101 Barn. & Cress., 459; 4 Cruise Dig., cites *Doe* v. *Jones*.)

An estate was conveyed in 1826 to such uses as A should by

deed appoint to him for life. A judgment had been entered up against A in 1822, at the suit of B. In March, 1827, A in execution of the power of appointment, reserved by the deed of 1826, appointed the estate to C, a mortgage for 500 years for securing £4,000 and interest. In December, 1827, the judgment creditor sued out a writ of *elegit* on the judgment. Lord Tenterden held that the lien of the judgment creditor was defeated by the appointment to the mortgagee. (*Doe* v. *Jones*, 10 Barn. & Cress., 459; *Tunstall* v. *Trappes*, 3 Sim., 300.) It is immaterial that the purchaser had notice of the judgment, and that a portion of the purchase money was set aside as security against it. (Sudgen, *supra*, 8th Ed., Ch. 9, Sec. 4, Sub. 6, page 481; *Eaton* v. *Sanxter*, 6 Sim., 517; *Skeeles* v. *Shearley*, 8 Sim., 153, 3 Myl. & Cra., 112.)

Therefore if Robert Forsythe had a vested interest in the property to which the lien of the appellants' judgment attached, that interest having been divested by the execution of the power, Corwith, the appointee under the power, took it discharged of the lien, and through him, as such appointee, the unincumbered fee came to the appellee.

In this case, until appointment made by Arthur to Corwith, the object designated by R. and Mary E. Forsythe, the seizin was in Mary E. Forsythe for life, it being a passive trust. (2 Wash., *supra*, 526–527; Hill on Trustees, Am. Notes, 233.) The use was at once executed in her and she was at once seized of the estate (Williams on Real Estates, 162, Note 1) under the statute of uses of Illinois, she being impowered "to "use, occupy and enjoy and receive the rents and profits of the "land," etc. Upon her death, the seizin had passed to Arthur in trust, etc., unless he as donee of the power in the trust deed, had previously appointed the fee to Corwith, the object designated by Robert and M. E. Forsythe jointly. As donee of the power Arthur was simply a feoffee for uses, and upon his appointing by deed, the fee in the land passed directly from Loomis, the grantor in the original deed, to

Corwith his grantee, as if therein so named, and all other estates limited in the trust deed thereupon ceased, were divested and cut off. (2 Wash., *supra*, 4 Ed., 637, Book 2, Ch. 6, Sec. 1, Sub. 5, and cases cited; Id. page 658.)

The execution of the power by Arthur was valid (opinion of the court, page 102, folio 238, page 103, folio 240), and vested the fee of the land in Corwith, under whom the appellee claims. "The trustee * * * executed a deed to Corwith on the "4th January, 1870, and it is under this deed that the defend- "ant Cochrane claims." (Page 102, folio 238.) "It seems to "me that any interest which he (Forsythe) had in the land at "the time the judgment was obtained was liable to be divested "by the appointment and execution of the power named in the "deed of trust." (Page 103, folio 240.) "The only estate that "he (Forsythe) at any time has had, has been by virtue of the "execution of the power under the appointment jointly by his "wife and himself."

XII.

The power was executed by the donee January 4, 1870. (Record, pages 8, 42, 99:) The consent was given November 3, 1869. Mary E. Forsythe died in November, 1869, or on or about January 1, 1870, (statement of facts by the court, page 101, folio 236); without issue. Afterwards Robert Forsythe married again, and 19th July, 1873, had one son lawfully begotten, more than a year old. When the power was executed, Robert Forsythe therefore had no lawfully begotten children *in esse*. Since their claims have been set up in behalf of his children since lawfully begotten to an intesest in said lands under the limitations in said trust deed, notwithstanding the execution of the power contained therein, and notwithstanding the decree of the Circuit court. It is therefore submitted that should the court hold the power to have been well executed in Corwith, its judgment may signify to quiet appellee's title, the effect thereof to divest and cut off all the

estates limited in said trust deed in default of said appointment by Arthur. "The execution of the power cuts off all the prior "estates." (4 Cruise Dig., Title 32, Deed, Ch. 17, Sec. 91.)

"The test of the validity of estates raised by appointment is "to place them in the deed creating the power in lieu of the "power itself." (2 Wash., *supra*, 4 Ed., 638, Sub. 7 and cases cited. *Ibidem*, 258.)

Placing the appointment to Corwith in the deed which created the power, Corwith appears to be the grantee of a fee of which Loomis is the grantor. The seizin thus passing from Arthur, by which the remainders limited by the trust deed were supported, they fell and ceased and were cut off as well by legal operation as by the provisions of the trust deed (Index 1, page 1), and the trust was fully executed and complete in Corwith with the appointment of the fee to him.

"A fee is an estate of perpetual continuance and unlimited "duration." (1 Wash., *supra*, 4 Ed. 70, Sub. 5; 2 id. 537, Sub. 2.) Seizin of an estate in fee simple absolute is one and indivisible (3 Wash., *supra*, 4 Ed., 125, Sub. 4) and it not being possible "that two persons should be actually seized of the same "land, by title adverse to each other" (*Ibidem*) the fee in Corwith cut off all other estates in the land.

The estates limited were remainders.

A remainder cannot be limited after a fee. "There can be "no remainder after a fee." (1 Wash., *supra*, 88; 2 id., 27, Sub. 30; 2 id., 543, Sub. 11.)

The execution of the power divested all vested estates, incompatible with the estate executed in Corwith (see 4 Kent Com., 12 Ed., 327, 328, and cases cited at those pages, and authorities under point XI, pages 58–60) and defeated them. So judgment that the execution of the power was valid and vested the fee in Corwith, defeats and cuts off the remainder limited in the trust deed.

Subsidiary Points.

I.

Assuming the power to have been well executed in Corwith and that appellant's judgment stood unextinguished by Forsythe's bankruptcy, still the trust deed of Forsythe to appellee's trustee, having attached a *specific* lien on the property, and that of appellant's judgment being a *general* lien, the appellee's title derived from the trust deed is superior in equity to that claimed by appellants under their judgment.

In England, before 2 Victoria, Ch. 110, judgments were general—since then, specific. (2 Sugden on Vendors, page 381.) In England before the statute, in Illinois and in New York, judgments are general liens on lands.

Judgments are general liens. They do not specifically charge lt haends, whereas mortgages do. (*Moyer* v. *Hinman*, 13 N. Y., 180, 186, 190; *Arnold* v. *Patrick*, 6 Paige, 315, 316 and note.) The note at page 316, of the cases in the United States Circuit court, of *Lane* v. *Ludlow*, &c., show that the court holds the lien of a judgment to be general and not a specific lien on the land, "for the creditor did not go on the security of the "land, but trusted to the general assets of the debtor and his "estate"; and that the *general* lien is bound by the *specific*. *Kiersted* v. *Avery*, 4 Paige, 9, 14, 15; *Morris* v. *Mowatt*, 2 Paige, 586–590; *White* v. *Carpenter*, 2 Paige, 217–266; *In re Howe*, 1 Paige, 125, 128, 188, 190; 1 John. Ch. Rep., 406; 4 Kent Com., 151, 154; 1 Powell, 435; Potter's Willard Equity Juris., 443, 444, foot paging 573, 574; *Tallman* v. *Farley*, 1 Barbour, 280, that the lien of a judgment is general and that of a mortgage specific.

A judgment being a general lien, is bound by a particular equity. (*Moyer* v. *Hinman*, 13 N. Y., *supra*, 180, 186, 190.)

The lien of a judgment is a general and not a special lien upon the debtor's real estate. Willard's (Potter) Equity Liens, pp. 249, 250, 439, 440, 442.

A judgment is not a specific lien on any particular real estate, but a general lien upon all his estate. (Freeman on Judgts. Sec. 338.) The judgment creditor has no *jus in re*, but a mere power to make his general lien effectual. (Id.)

A judgment lien on land constitutes no property or right in the land itself. He (the judgment creditor) has a mere general lien, and he cannot, like a mortgagee or other holder of a specific lien, sue for such waste as injures his security. (Id.) *Lansing* v. *Carpenter*, 48 N. York, 412.

A judgment lien on land constitutes no property or right in the land itself. (Freeman on Judgts., *supra*, Sec. 338.)

II.

Assuming the power to have been well executed in Corwith and that the appellant's judgment was valid notwithstanding Forsythe's discharge in bankruptcy, the delivery and filing for record of the deeds from Arthur to Corwith, of Corwith to Forsythe and of Forsythe's trust deed to the trustee of the appellee having been simultaneous with the payment of the purchase money, appellee's title under the trust deed takes precedence of prior judgment liens, and is there fore superior to and defeats that claimed by the appellants under the marshal's deed.

January 4, 1870, Arthur appointed to Corwith. March 12, 1870, Corwith conveyed to R. Forsythe. March 10, 1870, Robert Forsythe to Geo. Scoville, trustee of appellee. March 15, 1870, these deeds simultaneously with the payment of $15,000 purchase money to Robert Forsythe were delivered to Wright & Tyrrell, appellee's agents, and together filed for record.

If the trust deed had been given by Forsythe, the grantee,

to Corwith, his grantor and vendor, and not to the appellee's trustee, Scoville, Forsythe's judgment creditors could not have touched the land. (Potter's Willard Equity Juris., 444, foot page 574.) Having been given by Forsythe, the grantee, to the appellee who advanced the purchase money "back," cannot touch it. (*Stow* v. *Tifft*, 15 J. R., 458, 462; *Jackson* v. *Austin*, 15 J. R., 477; *Jackson* v. *McKenney*, 3 Wend., 233; *Jackson* v. *Betts*, 6 Cow., 376; *Wilson* v. *Troup*, 2 Cow., 218.)

A deed and mortgage acknowledged and recorded at the same time raises a presumption that they were simultaneous acts, and that the latter was given for the purchase money, although not given to the vendor but to a third person. (*Cunningham* v. *Knight*, 1 Barbour, 399, 406; *Kittle* v. *Van Dyck*, 1 Sand. Ch. Rep., 76, 79, 80, 81, 82, 141 (case of dower); *Stow* v. *Tifft*, 15 J. R., 458, 462, 463; *Jackson* v. *Dunsburgh*, 1 Johns. cases, 95; *Jackson* v. *Austin*, 15 J. R., 477; *Clark* v. *Monroe*, 14 Mass., 351; *Holbrook* v. *Finney*, 4 Mass., 569; *Card* v. *Bird*, 10 Paige Ch. Rep., 426, 427, 442; 4 Kent Com. 45; Potter's Willard Equity Juris., 434; *Haywood* v. *Nooney*, 3 Barbour, 643, 645; *White* v. *Carpenter*, 2 Paige Ch. Rep., 265, and cases cited; *Dusenbery* v. *Hurlbert*, 59 N. York., 541–544; *Tallman* v. *Farley*, 1 Barbour, 280.) The deed and mortgage are one. (4 Kent Com., 174.)

Stow v. *Tift*, 15 J. R., 455. Where the seizin of the husband is instantaneous, the wife is not endowable. (Page 462.)

Ibidem, 463. Where two instruments are executed at the same time, between the same parties, relating to the same subject matter, they are to be taken together, as forming the several parts of one agreement. (See *Jackson* v. *Dunsburgh*, 1 Johns. Cases, 95.)

Page 463. "Where a deed is given by the vendor of an es-"tate who takes back a mortgage to secure the purchase money "at the same time that he executed the deed, then the deed "and mortgage are to be considered as parts of the same con-

"tract, as taking effect at the same instant, and as constitut-
"ing one act. (See *Holbrook* v. *Finney*, 4 Mass., 569.) The
"substance is, the bargainor sells the land to the bargainee on
"condition that he pays the price at the stipulated time; and if
"he does not, that the bargainee shall be reseized of it free of
"the mortgage."

Jackson v. *Austin*, 15 John. Rep., 477. "The preference of
"a mortgage given by the purchaser of lands sold and con-
"veyed at the same time to secure payment of the purchase
"money, to previous judgments against the purchaser, is not
"restricted to the case of a mortgage to the vendor of the land.
"If the purchase money be advanced by a third person, to
"whom the purchaser, at the same time that the conveyance
"was executed to him, executed a mortgage of the same land
"to secure the money advanced, such mortgage is entitled to
"the same preference over a prior judgment, as the vendor of
"the land would have had, had the mortgage been executed to
"him."

This decision is based on a New York statute, which the court, SPENCER, J., in *Stow* v. *Tifft*, 15 J. R., 461, pronuunces to be in accordance with general equity principles, &c.

Haywood v. *Nooney*, 3 Barbour, 643--645, follows *Jackson* v. *Austin*, *supra*, and on general equity principles, that where a purchaser of land, at the same time he receives a conveyance, executed a mortgage to a third person, who advances the purchase money for him, such mortgage is entitled to the same preference over a prior judgment, as it would have had, if it had been executed to the vendor himself. In its legal effect, it is the same as though the purchaser had executed his mortgage to the vendor for the purchase money and he had then assigned it to the party advancing the money. *Cunningham* v. *Knight*, 1 Barbour, 399, is to the same effect on general principles of equity (not the N. York statute). See opinion, page 406, excludes the right of dower, and cites *Kittle* v.

VanDyck, 1 Sand. Ch. Rep., 76, *Jackson* v. *Dewitt*, 6 Cowen, 316, as especially in point.

Then comes among the cases placing a third person advancing the purchase money, and the vendor's mortgagor on the same footing, the case of *Dusenbery* v. *Hurlbert*, 59 N. York, 541, where the court say:

"Where lands are conveyed and a mortgage is at the same "time given for a portion of the purchase money by the pur- "chaser, the sale is subject to the lien for the unpaid purchase "money, which attaches instantly as a part of the indivisible "transaction, and the purchaser cannot give to another a lien "which will take priority of such mortgage." (Forsythe could not secretly have executed a mortgage defeating the appellee.)

Ibidem, 544, the court:

"The deed and Bowen's (the vendee's) mortgage, executed "at the same time, are to be construed together as one instru- "ment. They constitute an indivisible act. There never was "a moment between the seizin and the mortgage when Le "Grange (the purchaser) could encumber the estate to the "exclusion of the latter; and it follows that a prior mortgage "could not insert itself between them." (Cites *Stow* v. *Tifft*, 15 J. R., *supra*, 1 Sand. Ch. Rep., 141, and 26 N. York, 68.)

In *Tallman* v. *Farley*, 1 Barbour, 280, the court goes further and holds that mortgages given for *improvements* on the land are in equity superior to liens of prior judgment creditors of the mortgagor, and for the reason that the judgment debtor had no interest in the premises. The judgment creditor can take only what interest his debtor has.

"Where a purchaser secures the purchase money either to "the vendor or to one who pays it by a mortgage simultaneous "with his deed, it will take precedence of an outstanding judg- ment against him." (2 Wash., *supra*, 4 Ed., 65, Sub. 27.)

The title does not pass out of the vendor. (*Hitchcock* v.

North Western Ins. Co., 26 N. York, 68; Willard Equity Jurisprudence [Potter], 443, 444.)

"A purchase money mortgage executed simultaneously with "the deed of purchase excludes any claim or lien arising "through the mortgagor. 'It is a principle of law,' says Chief "J. CATON of Illinois, 'too familiar to justify a reference to the "authorities, that a mortgage given for the purchase money "of the land executed at the same time the deed is executed to "the mortgagor, takes precedence of a judgment against the "mortgagor. The execution of the deed and mortgage being "simultaneous acts the title of the land does not for a single "moment vest in the purchaser, but merely passes through his "hands and vests in the mortgagee, without stopping at all in "the purchaser, and during this instantaneous passage the "judgment lien cannot attach to the title. This is the reason "assigned by the books why the mortgage takes precedence "of the judgment rather than any supposed equity which the "vendor might be supposed to have for the purchase money." (1 Jones on Mortgages, Sec. 466; *Curtis* v. *Root*, 20 Illinois, 53–57; *Fitts* v. *Davis*, 42 Illinois, 391.)

"If the instruments are delivered at the same time, it does "not matter that they were executed on different days, because "they take effect only from delivery." (*Id.* Jones, *supra*, Sec. 465; Coke's Off. Revised Statutes, 180; *Mayburry* v. *Brien*, 15 Peters, 21; *Banning* v. *Edes*, 6 Minn., 402.

"A change in the form of the security for the purchase "money, as from a mortgage to a deed of trust, will not change "the character of the debt. The consideration continues to be "purchase money." (1 Jones, *supra*, Sec.466; *Curtis* v. *Root*, *supra*; *Austin* v. *Underwood*, 37 Illinois, 438.)

The same rule applies in case the mortgage is to another than the vendor who actually advances the means to pay the purchase money. (1 Jones, *supra*, Sec. 466; *Curtis* v. *Root*, *supra*; *Austin* v. *Underwood*, *supra*; *Beebe* v. *Austin*, 15 J. R.,

477; *Haywood* v. *Nooney*, 3 Barbour, 643; *Adams* v. *Hill*, 9 Fost. (N. Hamp.), 202; see also *Moon* v. *Titman*, 44 Illinois, 367, 369, 370.) It must appear, however, that the deed and the mortgage constituted but one transaction. (1 Jones, *supra*, § 466; *Grant* v. *Dodge*, 43 Maine, 489.)

A mortgage given at the time of the purchase of real estate to secure payment of the purchase money has preference over all judgments and other debts of the mortgagor to the extent of the land purchased. (Freeman on Judgments, 2 Ed., 360; *Parsons* v. *Hoyt*, 24 Iowa, 154; *Hughson* v. *Davis*, 4 Grant's Ch., 588; *Ruttan* v. *Levisconte*, 16 Queen's Bench, Upper Canada, 495.) A purchase money mortgage is good and effectual against the wife of the mortgagor without her joining in executing it. The seizin of the husband is instantaneous only; and it is a well settled rule, that in such cases no estate or interest can intervene. (1 Jones, *supra*, 464; North Carolina, Battle's revisal, 1873, Ch. 35; Sec. 30; *Birnie* v. *Main*, 29 Ark., 591; *Stow* v. *Tifft*, 15 J. R., 458; *Mills* v. *Van Voorhies*, 20 New York, 412.)

This rule applies even where the mortgage is made to a third person. (*Clark* v. *Munroe*, 14 Mass., 351; *McGowan* v. *Smith*, 44 Barbour, 232; *Kittle* v. *VanDyck*, 1 Sand. Ch. Rep., 76.)

Dower attaches against everyone but the mortgagee and his assigns. (*Young* v. *Tarbell*, 37 Maine, 509; 1 Jones, *supra*, Sec. 464.)

The effect of a mortgage to secure purchase money executed simultaneously with the deed to the vendee, is that the vendee has only an instantaneous seizin, and the legal title remains with the vendor, who becomes mortgagee of the land. (Jones, *supra*, Sec. 465; *Baker* v. *Clepper*, 26 Texas, 629.)

Synopsis of Points of Brief and Argument.

I.

The trust deed from Loomis to Arthur limited to Robert Forsythe a contingent remainder for life in the lands, dependent on the death in his lifetime of his wife, Mary E. Forsythe, without issue. He therefore took no right or interest and no estate in the lands to which the judgment of the appellants could attach a lien.

II.

The appellant's judgment in March, 1866, against Robert Forsythe as one of the co-partnership firm of Forsythe & Brown, was extinguished by Robert Forsythe's discharge in bankruptcy, March 26, 1868.

III.

The agreement between Forsythe and Corwith was a sale on condition, and not a redeemable mortgage. The understanding between them was not that the deed absolute to Corwith should be a mortgage, but Forsythe, when able, might purchase the property back.

First. The evidence, when analyzed, shows that the intent of Forsythe and Corwith and their agreement were that Forsythe *should purchase back the property* conveyed by deed absolute to Corwith. The authorities applicable to the evidence so hold.

Secondly. The appointment by Arthur to Corwith was an extinction of Forsythe's indebtedness to Corwith, and the debt thereafter did not subsist.

Thirdly. The agreement was not that Corwith should reconvey to Forsythe, but that Forsythe should purchase the property back. If, however, it had been to reconvey, it would not have turned an absolute deed into a mortgage.

Fourthly. The price was not inadequate, but a reasonable price, in a contract of purchase and sale.

Fifthly. Forsythe's possession of the property, when the deeds were delivered and filed for record, and his devotion of the rents afterwards to the payment of the interest on the purchase money, were *notice* to the appellee of his "purchase "back" of the property.

Sixthly. The appointment to Corwith was for the exclusive benefit of Forsythe. He received the purchase money and the fee to his own proper use. The power was executed at law, and if only partially executed in equity (if the deed absolute was converted into a mortgage), the execution having conferred on Forsythe the benefit designed obviously by Loomis, the donor of the power, as appears in the original instrument creating the power, the court will supply or correct any defect in the execution of the power by holding it well executed in Corwith.

Seventhly. Forsythe was a stranger to the grant. To convert a deed absolute into a mortgage, the defeasance must be to the grantor and not to a stranger. The defeasance being, as alleged, to Forsythe, the deed absolute was not converted into a mortgage.

In cases of the execution of powers by deed, the defeasance being either to the donee of the power or the person whose consent is required, and not to the grantor of the power, the deed, it would seem, is not capable of being turned into a mortgage.

Eighthly. Arthur, though he could appoint a less estate than a fee, could not appoint a mortgage, which is *no* estate.

Neither could he appoint a mortgage as a revocation *pro tanto*, for he had no power of revocation granted or reserved. As the donee of the power intended the fee to be appointed for Forsythe's benefit, and as courts lean to the execution of the power, the court will not determine that the deed absolute to Corwith, which Arthur could appoint, was a mortgage which he could not appoint.

Ninthly. The conveyance from Arthur to Corwith and that from Corwith to Forsythe were simultaneously delivered and recorded along with the trust deed from Forsythe to Scoville, when also the money was simultaneously paid by appellee's agents to Forsythe, and by Forsythe to Corwith, March 15, 1870. All these constituted *one indivisible act.* The deeds took effect only *then* and that *instantaneously.* There was no interval of time of which a mortgage could be predicated, and over which it could extend. The title passed instantaneously by the conveyance from Arthur to Corwith, and from him to Forsythe, and from Forsythe to the appellee. The instant that Corwith took the fee, his indebtedness was paid to him by Forsythe, and at the same instant Forsythe took the fee from Corwith, which fee passed instantaneously into appellee by Forsythe's trust deed to Scoville. In the same instant that $15,000 was paid by appellant's agents.

IV.

Robert Forsythe, as one of two joint consenting persons (himself and Mary E. Forsythe), had no interest in the property on which appellee's judgment could attach a lien.

(1.) It is an intangible, incorporeal right, the same as if it did not exist.

(2.) If he had such an interest, it was not liable to the lien of appellant's judgment of March, 1866, *before* his consent

given (November 3, 1869), and if it was liable *after* his consent was given, the appellant's judgment had then been extinguished by Forsythe's discharge in bankruptcy in 1868.

(3.) The character of the power, whether *general* or *special*, is determined by the nature of that possessed by the donee exclusively. Arthur's, *the donee's*, power was special to appoint to the object designated by Robert and Mary E. Forsythe. The power must be a *general* power, that will allow chancery "to seize the property for the payment of creditors," on appointments made. But if the power had been in the persons of consent alone, and that a *general* power, appellant's judgment was no lien before their consent was given, and after it was given (November 23, 1869), their judgment had been extinguished by Forsythe's bankruptcy in March, 1868.

When Robert Forsythe went into bankruptcy in 1868 he had only a contingent remainder in the property, on which appellants' judgment attaches no lien; and, therefore, notwithstanding his bankruptcy, Forsythe was capable, subsequently, of executing the power. His and his wife's joint designation executed the power, and through it, by the conveyance from Corwith, took the only interest that he has had in the land. (Opinion of the court.)

V.

The agreement between Forsythe, one of the two persons of consent, and Corwith, the appointee of the power, if for the benefit of Forsythe, did not invalidate the execution of the power. Supposing him to have been the donee of a general power, and responsible to the rules which bind such donees,

1. The appointment of a donee to himself is good.

2. His execution of the power would have passed a good title to the appellee as a *bona fide* purchaser for a valuable consideration, and that, either with or without notice of appellants' judgment.

VI.

Forsythe having had no interest in the land under his contingent remainder (Point I), and therefore appellant's judgment having had no lien on the land if their judgment was not extinguished by Forsythe's bankruptcy (that it was, see Point II), its lien attached on the property only when Corwith conveyed to Forsythe. Having levied on and sold the lands conveyed by Corwith to Forsythe, the appellants derive title from the marshal's deed to the lands so conveyed, under and through Arthur's appointment to Corwith, who was Forsythe's grantor. They are therefore bound by the recitals in Arthur's deed to Corwith of the due execution of the power, and are dseetopd to impeach or deny it.

VII.

The power being a power with but *a single object*, and not a power with *several objects*, the agreement between Forsythe and Corwith (supposing Forsythe a sole donee of the power) even if corrupt, would not have vitiated the execution of the power, it being only in "illusory execution of powers," where there are several objects, that fraud is held to defeat.

VIII.

The agreement between Forsythe and Corwith was in terms, a condition, annexed without authority to the execution of the power, and as such void, leaving the execution of the power good.

IX.

The power to Arthur was blended with a trust—intended by the trust deed containing the power for the benefit of Robert and Mary E. Forsythe. Had Arthur refused to appoint to

Corwith upon his designation by them, chancery would have compelled him to do so, not only, notwithstanding, but for the benefit of Robert and Mary E. Forsythe or either of them.

X.

Robert Forsythe was declared a bankrupt in 1868. If Forsythe is one of two persons on whose joint designation the appointment to Corwith was made, *be the donee of the power*, his bankruptcy in 1868 does not invalidate the execution of the power in 1869.

XI.

The execution of the power by Arthur was valid and vested a fee simple absolute in Corwith in the land, which cut off and defeated all the estates limited by the deed of trust to Arthur. (Opinion of the court, page 102, folio 235; page 103, folio 240.)

XII.

The execution of the power divested the lawfully begotten children of Robert Forsythe of their remainder in fee limited to them under the trust deed to Arthur and all the other estates thereby limited, as they set up claims under such trust deed. Notwithstanding the execution of the power and notwithstanding the decree of the Circuit court the court is asked for such opinion as will quiet the appellee's title.

Respectfully submitted,

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Pro Se.